Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1997

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

DAVID DUMSCHAT
Respondent

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Intervening Respondents

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, who consist of the membership of the Connecticut Board of Pardons, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit wherein

following an order from the Supreme Court remanding the case to the Second Circuit the latter Court held in part, as follows:

> "Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." See Appendix pp. 4a-5a.

This judgment and opinion of the Second Circuit were rendered following the order of the Supreme Court in *Connecticut Board of Pardons, et al v. David Dumschat, et al*, No. 78-1533, entered on June 11, 1979 which provided as follows:

"The motion of respondents for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. (1979)." See Appendix p. 17a. See also, _____ U.S. _____, 99 S.Ct. 2854 (1979).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at pp. 1a-16a.

The previous opinion of the United States Court of Appeals for the Second Circuit upon which the order of the Sup-

reme Court of June 11, 1979, was based, appears in the Appendix at p. 18a, and is reported in 593 F.2d 165 (2d Cir. 1979).

The opinion of the District Court for the District of Connecticut appears in the Appendix at p. 21a, and is reported in 462 F.Supp. 509 (D.Conn. 1978). Incorporated in its decision is an earlier decision from the District Court in *Dumschat v. Board of Pardons*, 432 F.Supp. 1310 (D.Conn. 1977).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Second Circuit were rendered on March 20, 1980. This Petition for a Writ of Certiorari was filed within ninety days of this date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Has the practice of the Connecticut Board of Pardons in reducing the minimum terms of inmates sentenced to life sentences in Connecticut thus accelerating their eligibility to be considered for release to the community by the Connecticut Board of Parole given such inmates after serving an as yet judicially undetermined amount of time, a protected liberty interest such that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that such inmates, when they reach this as yet undetermined point in their sentence, be given written explanations of adverse decisions by the Board of Pardons?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In February, 1976, David K. Dumschat instituted an action in the District Court for the District of Connecticut claiming, in essence, that he had been deprived of a federally protected right within the purview of 42 U.S.C. 1983 because the Connecticut Board of Pardons had, on a number of occasions, denied him a pardon and on no occasion did the Board provide him with a statement of reasons for this denial. Dumschat's claim is that he is entitled to such a statement under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In that action Judge Blumenfeld concluded that ". . . due process attaches to the denial of a pardon to an inmate like Dumschat sentenced to life-imprisonment who has served almost two-thirds of his minimum term." *Dumschat v. Connecticut Board of Pardons*, 432 F.Supp. 1310, 1315n.17 (D.Conn. 1977). In accordance with the Court's opinion, a declaratory judgment was issued ". . . that judgment enter and hereby does enter for the Plaintiff David K. Dumschat and that the Defendant the Connecticut Board of Pardons furnish Plaintiff a written statement of reasons and facts relied upon in denying him a pardon."

The authority to pardon which is involved is the authority of the Connecticut Board of Pardons under Section 18-26, Connecticut General Statutes, to reduce the minimum term of an inmate including, of course, an inmate serving a life term, thereby accelerating the inmate's eligibility for consideration for release to the community by the Connecticut Board of Parole. (See: *Dumschat v. Board of Pardons, State of Connecticut*, 432 F.Supp. 1310, 1312 (D.Conn.1977) and the opinion of the Second Circuit following remand, (App. p. 5a footnote 1.)

The Board of Pardons took an appeal to the United States Court of Appeals for the Second Circuit from that judgment.

On June 16, 1977, Dumschat was given relief by the Board of Pardons. The parties agreed that this relief rendered the appeal moot pursuant to *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976) cert. denied, 430 U.S. 941, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977).

By order of the Court dated January 12, 1978, the case was remanded to the District Court.

In December, 1977, James Brown, Stanley Czaja and James Shelton, each of whom are also serving life sentences, filed an action in the District Court making the same claims as Dumschat.

As with Dumschat, these three plaintiffs had been denied a pardon without being given a statement of reasons.

The defendants moved in the District Court to vacate its judgment in *Dumschat* and to dismiss as moot. This motion was denied.

The plaintiffs in both actions in the District Court were represented by the same counsel. The plaintiffs Brown, Czaja and Shelton filed a Motion to Intervene in *Dumschat*, to consolidate their action with *Dumschat* and to have the consolidated action certified as a class action.

All of these motions were granted by Judge Blumenfeld.

An additional evidentiary hearing was held in the District Court at which the parties agreed and the Court approved that the record before the Court in *Dumschat* would be included in the record in the consolidated actions then before the Court as

well as the record in a previous similar action which became moot after trial but before decision, *Carrona v. John R. Manson, et al.* (D. Conn.), Civil No. H-74-377.

Judge Blumenfeld reached the same conclusion that he had reached in his earlier decision in *Dumschat* and, in addition, went beyond that earlier decision and held that:

> "Therefore, because an inmate's liberty interest is seriously affected by the pardon procedure, I need not 'draw the constitutional line' in the present action.[1] In a pardon hearing of an inmate sentenced to life imprisonment, the Due Process Clause protects the inmate's interest in obtaining reasons for denial of pardon irrespective of the time served on his sentence when his pardon application is considered.
>
> "After hearing the testimony of the present Chairman of the Board of Pardons, it appears that the conditions present at the time of my original decision on this matter continue to exist without interruption or change. Therefore, in all respect, I adhere to my prior decision in this matter and rule that the Connecticut Board of Pardons furnish any member of the plaintiff class a written statement of reasons and the facts relied on when he is denied a pardon." (See Appendix, p. 25a); *Dumschat v. Board of Pardons*, 462 F.Supp. 509, 511-12 (D.Conn. 1978).

Two judgments were entered in the District Court, one in *Dumschat* as consolidated with Brown, Czaja and Shelton as intervening plaintiffs (District Court Docket No. H-76-102) and the second in the action brought by Brown, Czaja and Shelton (District Court Docket No. H-77-657).

---

[1]As is noted above, Judge Blumenfeld's previous decision was limited to persons sentenced to a term of life imprisonment who have served ". . . almost two-thirds of [their] minimum term."

Insofar as is pertinent, these judgments provided that "It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter . . . that the Connecticut Board of Pardons furnish any member of the Plaintiff class [inmates currently serving sentences of life imprisonment at the Connecticut Correctional Institution, Somers and the Connecticut Correctional Institution, Enfield] a written statement of reasons and facts relied upon when such member of the Plaintiff class is denied a pardon by the Board." (See Appendix, pp. 26a-27a.)

In a *per curiam* opinion, the judgments were affirmed by the United States Court of Appeals for the Second Circuit. That Court's opinion is contained in the Appendix at p 18a; *Dumschat v. Board of Pardons*, 593 F.2d 165 (2d Cir. 1979).

The Board of Pardons then petitioned this Court for a Writ of Centiorari. This petition was granted by this Court on June 11, 1979 and this Court ordered that "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex* [99 S.Ct. 2100 (1979)]."

The Second Circuit requested the parties to file further briefs with that Court taking into consideration this Court's opinion in *Greenholtz*. The parties filed their respective briefs, and on March 20, 1980 the Second Circuit entered the following judgment which is the basis upon which this Petition for a Writ of Certiorari is filed:

> "Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates

receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." See Appendix pp. 4a-5a.

REASONS FOR GRANTING THE WRIT

1. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDES A FEDERAL QUESTION IN A WAY WHICH IS IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

Rule 19.1.(b) of the Rules of this Court provides, in part, that one of the factors to be considered in granting certiorari is whether ". . . a court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court . . ."

The authority of the Connecticut Board of Pardons, insofar as is relevant to this action, is provided for in Section 18-26, Connecticut General Statutes. This statute provides, in part, that:

> "(a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence."

As is noted above, the authority of the Board which is involved here is its authority to reduce the minimum term of the sentence of a person who is confined with the result being that the person's eligibility to be considered for release to the community by the Connecticut Board of Parole is accellerated. (See: *Dumschat v. Board of Pardons*, 432 F.Supp. 1310, 1312 (D.Conn. 1977), and the Opinion of the Second Circuit following remand, App. p. 5a footnote 1.)

The paroling authority in the State of Connecticut is in the Connecticut Board of Parole (See: Section 54-124a, Connecticut General Statutes). The Board of Parole is a separate and distinct agency from the Board of Pardons.

With regard to this paroling authority the Connecticut Supreme Court has held that:

> "The sole statute concerning parole, § 54-125, simply provides that an inmate who has served his minimum sentence 'may be allowed to go at large on parole in the discretion of the panel of the board of parole for the institution in which the person is confined.' There is no statutory requirement that the panel actually consider the eligibility of any inmate for parole, the statute does not vest an inmate with the right to demand parole, and there is no statutory provision which even permits an inmate to apply for parole." *Taylor v. Robinson*, 171 Conn. 691, 697, 372 A.2d 102 (1976).

The interpretation of this statute by "[t]he highest state court is the final authority on state law . . ." *Fidelity Union Trust Co. v. Field*, 61 S.Ct. 176, 178 (1940).

Upon reconsideration following the remand from this Court the Second Circuit correctly concluded that ". . . Connecticut's pardon's statute [Sec. 18-26, Conn. Gen. Stat.] con-

tains neither a presumption of pardon nor a list of factors to be considered by the Board of Pardons. Instead, the statute grants the board *unfettered discretion in the exercise of its power* . . . . The statute offers only a 'mere hope' of pardon; it does not create a legitimate expectation of freedom and therefore does not implicate due process." (See Appendix p. 9a) (Emphasis added).

The Second Circuit went on, however, to affirm the contention of Connecticut's life inmate ". . . that they had a legitimate expectation of pardon and release — and due process rights in pardon proceedings — by virtue of the regularity with which the Board of Pardons grants them relief. Though the statistical evidence provided below by state officials was not, as Judge Blumenfeld noted, 'as extensive as might be desired,' 432 F.Supp. at 1314, it was sufficient to establish that pardons are granted to Connecticut's life inmates with compelling frequency. Bernard Gates, then chairman of the Board of Parole, testified that more than 75 percent of Connecticut's 'lifers' have their eligibility for parole accelerated by the Board of Pardons. Ninety percent of these inmates are then granted parole within their first year of eligibility, and all are paroled after no more than a few years' wait. In addition, the board grants immediate release to a number of other life inmates by commuting their sentences to time served." (See App. pp. 10a-11a.)

In so holding, the Second Circuit clearly concluded that this Court's opinion in *Greenholtz* did not affect the Second Circuit's conclusion before remand that "The vast majority of those in the plaintiff class, a class composed of those serving life sentences, are granted relief by the Board of Pardons prior to the expiration of 20 years, the statutory minimum period (less time for good behavior) that lifers must ordinarily serve before they are eligible for parole. [that] This almost invariable practice creates in the class a liberty interest in the pardons process." (See App. p. 20a); *Dumschat v. Board of Pardons*, 593 F.2d 165, 166 (2d Cir. 1979).

Thus, the Second Circuit concluded that a lifer in Connecticut who has no statutorily based expectation of being released on parole or of even being considered eligible or applying for parole (*Taylor v. Robinson*, supra) and who under its opinion applies for a pardon to a board with "unfettered discretion" nevertheless has a "legitimate expectation of pardon and release" so as to trigger the applicability of due process at least to the extent of requiring the Board of Pardons to provide the life term inmate with "written explanations of adverse decisions" when he has completed some as yet undetermined portion of his sentence.

To have this legitimate expectation based solely upon the Board's history in granting pardons, such as that history appears thus far in the record, not only raises the question of how anyone could arrive at such an expectation in view of the discretion of the Board which considers his case but it is also difficult to understand in view of the Court's stated rationale for requiring such a written statement.

This rationale is that "The need to give reasons encourages fair and thoughtful deliberations by the board, thus protecting against arbitrary and constitutionally impermissable decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel." [Thirteen different people sat on the five person board between November 1973 and November 1976.] Finally, it helps inmates to correct misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief". (Appendix pp. 14a-15a).

It is respectfully claimed that it is simply inconsistent to say that a lifer, at some point in his sentence, acquires a constitutionally protected legitimate expectation of relief from the Board because of the Board's history in dealing with lifers

and at the same time, justify the constitutional relief given on the grounds that this relief "encourages fair and thoughtful deliberations . . ." and that it "protect[s] against arbitrary and constitutionally impermissable decisions" and that it "promotes consistancy" and that it "corrects misunderstandings".

Putting the Board's statutorily "unfettered discretion" aside, since the Court feels that the administrative process itself is subject to such defects, and in this regard the petitioners do not concede this to be the case, then one has to wonder how a lifer could have any expectation of favorable action from a Board whose history of prior decisions upon which that expectation is promised, has been and presumably will continue to be so influenced by chance.

> "The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest.
>
> '[T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake . . .' Board of Regents v. Roth, 408 U.S. 564, 570-571; 92 S.Ct. 2701, 2705-2706, 33 L.Ed. 2d 548 (1974).
>
> This has meant that to obtain a protectible right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' Id., at 577, 92 S.Ct. at 2709.
>
> "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire

> of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.' Meachum v. Fano, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1977)." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, et al.*, 99 S.Ct. 2100, 2103-2104 (1979).

Under the circumstances found by the Second Circuit as noted above, it is impossible to see how a lifer in Connecticut when applying for a pardon can be said to have "a legitimate claim of entitlement to it".

The lifer's expectation of obtaining pardon, which is comparable to that of a prisoner in remaining at a particular institution, is simply ". . . too empheral and insubstantial to trigger procedural due process protections . . .". *Meachum v. Fano*, 427 U.S. 215, 228, 96 S.Ct. 2532, 2540, 49 L.Ed.2d 451 (1976).

Lastly, with regard to this Court's opinion in *Greenholtz*, the Second Circuit held that in basing their conclusion on the Board's history "We find nothing in *Greenholtz* that precludes this holding." (App. p. 12a). In so doing, the Second Circuit rejected the claim of the petitioners that *Greenholtz* does preclude such a holding. (See App. p. 12a footnote 6).

In *Greenholtz*, similar statistics were available to this Court, by virtue of the certified record, for the District Court had included in its decision a table showing numbers of inmates eligible for discretionary parole and the number who obtained it. *Inmates of Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F.Supp. 430 (1976) table at 439.

Simple calculation shows that among Caucasians, Blacks

and Mexicans eligible for discretionary parole approximately sixty percent of each group achieved release. Thus, if local Board practice which resulted in a statistical showing that it was more likely than not, that one would achieve discretionary parole were a sufficient basis for a protected liberty interest then this Court would have so found in *Greenholtz*.

Instead, this Court found "That the State holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained". *Greenholtz*, supra, at 2105. (Court's emphasis).

That Connecticut may grant a slightly higher percentage of reduced terms to lifers through its pardons process than Nebraska does discretionary paroles through its parole process is not constitutionally significant. There is no basis upon which to draw a constitutional line at seventy-five percent.

In any event, as "Judge Henry Friendly cogently noted . . .;' [T]here is a human difference between losing what one has and not getting what one wants.' Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1267, 1296 (1974)." *Greenholtz*, supra, 2105.

The life inmate in Connecticut who is denied a reduction in his minimum term is not in the situation of losing what he has but rather in the situation of not getting what he wants.

2. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS ALSO IN CONFLICT WITH THIS COURT'S OPINION IN *SCHICK V. REED*.

This conclusion of the Second Circuit of a "liberty interest" is contrary to the opinion of this Court in *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).

In *Schick* this Court dealt with the authority of the President to ". . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Article 2, Section 2, Clause 1, United States Constitution.

In *Schick* this Court characterized one who seeks a pardon as a ". . . person who *petitions for mercy* . . ." *Schick*, supra, 419 U.S. 267, 95 S.Ct. 385 (emphasis added).

In *Schick*, this Court considered the origins of the President's pardoning power and observed the following:

> "At the time of the drafting and adoption of our Constitution it was considered elementary that the prerogative of the English crown could be exercised upon conditions:
>
> 'It seems agreed, That the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.' 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)." *Schick*, supra, 419 U.S. 261, 95 S.Ct. 382.

This Court then went on to hold that:

> "The history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice." *Schick*, supra, 419 U.S. 262, 95 S.Ct. 383.

This Court further held that "The plain purpose of the broad power conferred by Section 2, cl. 1, was to allow *plenary* authority in the President to '*forgive*' the convicted person in part or entirely, to reduce a penalty in terms of a specified

number of years, or to alter it with *conditions which are in themselves constitutionally unobjectionable.*" *Schick*, supra, 419 U.S. 266, 95 S.Ct. 385. (Emphasis added).

Thus, since the pardoning power is "plenary" subject only to the attachment of conditions which are constitutionally unobjectionable then the denial of a pardon must be "plenary" subject only to the condition that a denial may not be based upon constitutionally impermissable reasons. There is no claim in this case that the denial was based upon constitutionally impermissable reasons.

If the Connecticut Board of Pardons were required to state reasons for denying relief, then it would seem inescapable that the President of the United States in denying pardon relief would similarly be required to state his reasons. Such a conclusion seems ridiculous on its face.

So long as the Board does not deny a pardon for a constitutionally impermissable reason there is no statement which it could give which would serve any purpose. It is impossible to conceive of a situation wherein any court absent the denial of a pardon because of the applicant's race, religion, etc. would overrule a Pardon Board decision to deny clemency.

3. THE QUESTION OF TO WHAT EXTENT, IF ANY, DUE PROCESS APPLIES TO PARDON PROCEEDINGS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Rule 19.1(b) of this Court further provides, in part, that one of the factors to be considered in granting Certiorari is whether ". . . a Court of Appeals has . . . decided an important question of Federal Law which has not been, but should be, settled by this Court . . ."

In premising their conclusions upon the history of the Connecticut Board of Pardons in granting relief to lifers the Second Circuit has "decided an important question of Federal Law which has not been, but should be, settled by this Court."

If one regards the pardoning process as a socially useful instrument, then it is difficult to understand the burdening of this process only because of its liberal use.

Certainly the rationale of the Second Circuit would serve as authority for *not* requiring a written explanation for the denial of a pardon in a state where prior history showed an infrequent use of this authority.

If, in fact, the applicability of the due process clause may differ from state to state depending upon the attitudes, philosophies, and personalities of the individual pardoning authorities, then that situation should be the result of a decision from this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case presents (1) an opinion of a United States Court of Appeals deciding a federal question in a way which is in conflict with the applicable decision of this Court and (2) which involves an important question of federal law which has not been but should be settled by this Court.

The Petitioners respectfully request that a Writ of Certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Second Circuit.

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Counsel for Petitioners

CERTIFICATION

This is to certify that on this day of June, 1980, two copies of this Petition for Writ of Certiorari and Appendix thereto were mailed, postage prepaid, to Stephen Wizner, 127 Wall Street, New Haven, Connecticut, counsel for the Respondents.

STEPHEN J. O'NEILL
Assistant Attorney General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

DAVID DUMSCHAT
Respondent

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Intervening Respondents

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 481, 482—September Term, 1979.

(Submitted November 16, 1979

Decided March 20, 1980.)

Docket Nos. 78-2124, 78-2125

DAVID DUMSCHAT,

Plaintiff-Appellee,

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Intervening Plaintiff-Appellees,

—v.—

BOARD OF PARDONS, State of Connecticut; and RICHARD K. LUBLIN (Chairman), ALVIN DOZEMAN, PAUL J. MCQUILLAN, JOHN P. COTTER, and MICHAEL E. DUBISSETTE, Members of the Board of Pardons,

Defendants-Appellants.

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Plaintiffs-Appellees,

—v.—

BOARD OF PARDONS, State of Connecticut, and PAUL J. MCQUILLAN (Chairman), ALVIN DOZEMAN, MICHAEL E. DUBISSETTE, JOHN SPEZIALE and PHILIP TATOIAN, Members of the Board of Pardons,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
SMITH* and OAKES, *Circuit Judges.*

On remand from the Supreme Court vacating the judgment of this court, 593 F.2d 165 (2d Cir. 1979).

We affirm our earlier decision and remand to the district court for further proceedings consistent with this opinion.

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* Pursuant to §0.14 of the Rules of this Court, this appeal is being determined by Chief Judge Kaufman and Judge Oakes. Judge Smith read the briefs in this case and voted before his death on February 16, 1980, to dispose of the case in the manner set forth in this opinion. He was unable to concur in the written opinion since it was drafted after his death.

CARL R. AJELLO, Attorney General of the State of Connecticut, Hartford, Connecticut (Stephen J. O'Neill, Assistant Attorney General, of counsel), *for Defendants-Appellants.*

STEPHEN WIZNER, Yale Legal Services, New Haven, Connecticut (Dennis E. Curtis, Alice Bussiere and Judith Resnik, of counsel), *for Plaintiffs-Appellees.*

PER CURIAM:

This case returns to us on remand from the United States Supreme Court. In our previous decision we affirmed, *per curiam*, the judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, that inmates serving life sentences in Connecticut prisons have a due process right to written statements from the state Board of Pardons explaining the denial of their applications for pardon. *See* 593 F.2d 165 (2d Cir. 1979). The Supreme Court vacated our judgment, 99 S.Ct. 2854 (1979), and remanded for reconsideration in light of *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100 (1979).

Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected "liberty" interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to deter-

mine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected "liberty" interest and due process rights.

I.

This action was commenced by plaintiff David Dumschat in February 1976. Dumschat was serving a life sentence following a 1964 homicide conviction, and, under state law, he was not eligible for parole until December 1983. Dumschat had appeared several times before the Connecticut Board of Pardons, which is empowered by statute to grant a life inmate his immediate release or to accelerate his eligibility for parole. Conn. Gen. Stat. Ann. § 18-26.[1] On each occasion, the board rejected Dumschat's application without written or oral explanation.

After rehearing testimony from officials of the pardon and parole boards, Judge Blumenfeld concluded that Dumschat had a protected liberty interest in the pardons process. *See* 432 F. Supp. 1310 (D. Conn. 1977). Accordingly, he issued a declaratory judgment holding that the Board of Parole violated Dumschat's

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1 The board is authorized to grant pardons "conditioned or absolute." Its members testified below that the board has never to their knowledge granted an inmate an absolute pardon, *i.e.*, a pardon releasing him unconditionally and absolving him of guilt in the crime for which he was imprisoned. (Such slate-cleaning pardons are occasionally issued to former inmates.) The board occasionally pardons an inmate on time served. Such a commutation of sentence gives the inmate immediate, unconditional freedom but does not erase the underlying conviction. Favorable action by the board usually takes the form of a reduction in the inmate's minimum term. This type of "pardon" simply hastens the inmate's eligibility for parole; his release requires a favorable ruling by the Board of Parole.

due process rights when it failed to provide a written statement of reasons explaining its action.

On the very date that Judge Blumenfeld issued his decision, June 16, 1977, the Board of Pardons commuted Dumschat's sentence to time served, thereby granting him his immediate release. Nevertheless, Judge Blumenfeld denied the defendants' motion to vacate his judgment as moot.[2] Instead, he allowed three other life inmates to intervene and to consolidate their pending suit against the Board of Pardons with Dumschat's. The judge also granted the intervenors' motion to certify the consolidated suit as a class action, brought on behalf of all inmates serving life sentences in Connecticut state prisons. After a new round of hearings, Judge Blumenfeld expanded his original decision to encompass the new plaintiff class. The Board of Pardons, he ruled, must furnish a written statement of reasons whenever a life inmate is denied a pardon. 462 F. Supp. 509 (D. Conn. 1978). This court affirmed his decision in a *per curiam* opinion. Our affirmance was then vacated by the Supreme Court and remanded with instructions to reconsider in light of the Court's recent decision in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, *supra*.

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2 The defendants appealed the original *Dumschat* decision to this court, then moved for us to vacate the district court judgment as moot and remand to Judge Blumenfeld with instructions to dismiss the complaint. We chose simply to remand without further comment or instructions.

II.

In *Greenholtz*, the Supreme Court held that Nebraska state inmates were not constitutionally entitled to formal hearings before the Nebraska Board of Parole or to detailed written explanations of adverse parole decisions. The Court declared, first, that a state does not create a constitutionally cognizable liberty interest in parole release simply by establishing the possibility of parole. The "mere hope" of future freedom, without more, was deemed insufficient to invoke due process. *See* 99 S.Ct. at 2103-05. Analogizing to the standards for determining the existence of a protected property interest, as articulated in *Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972), the Court indicated that the existence of a protected liberty interest in parole depends on whether inmates enjoy a "legitimate expectation" of parole release. 99 S.Ct. at 2103-05. The Court found that such an expectation was generated by Nebraska's statutory parole scheme and that "the expectancy of release provided in this statute is entitled to some measure of constitutional protection." *Id.* at 2105-06. The Court held, however, that this protection did not extend so far as to mandate formal hearings before the parole board or detailed explanations of parole rejections. *Id.* at 2106-08.

III.

Our first task is to consider, in the wake of *Greenholtz*, whether Connecticut's life inmates have a protected interest in the pardons process. In *Boothe* v. *Hammock*, 605 F.2d 661 (2d Cir. 1979), this court embraced the Supreme Court's declaration in

Greenholtz that the establishment of a parole system does not in itself give rise to due process rights in parole procedures. Similarly, in *Pugliese* v. *Nelson*, Nos. 79-2136, 2138, 2140 (2d Cir. Mar. 4, 1980), we acknowledged that *Greenholtz* required us to overrule our decision in *Cardaropoli* v. *Norton*, 523 F.2d 990 (2d Cir. 1975), which held that simply the threat of "grievous loss" was sufficient to trigger due process protection. Thus, we held that no liberty interest was implicated in a classification scheme that hindered an inmate's ability to participate in social furlough, work release, and halfway house programs.

An inmate's stake in the pardons process is essentially the same as his stake in parole, furlough, or work release: early release from incarceration. A state no more creates a protected interest by holding out the possibility of pardon, absolute or conditional, than it does by offering the possibility of parole or furlough. To prevail, therefore, Connecticut's life inmates must show more than a "mere hope" or subjective anticipation of pardon; they must, instead, show an expectation with some concrete, objective basis. *See Greenholtz*, *supra*, 99 S.Ct. at 2103-05; *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 576-78. As we stated in *Pugliese*, *supra*, slip op. at 1605, to "qualify as constitutionally protected 'liberty', the prisoner's interest must be . . . one that he would normally expect to have as a matter of custom and practice."

In *Greenholtz*, the Supreme Court found that a constitutionally significant expectation of parole was created by the language of the Nebraska parole statute. It provided that the parole board "shall order" an inmate's release when he becomes eligible for parole in the absence of specific disqualifying conditions. *See*

Neb. Rev. Stat § 88-1,114(1).[3] In marked contrast, Connecticut's pardons statute contains neither a presumption in favor of pardon nor a list of factors to be considered by the Board of Pardons. Instead, the statute grants the board unfettered discretion in the exercise of its power. *See* Conn. Gen. Stat. Ann. § 18-26.[4] The statute offers only the "mere hope" of pardon; it does not create a legitimate expectation of freedom and therefore does not implicate due process. *See Pug-*

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3 The statute provides in pertinent part:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

It was apparently the presumptive "shall order . . . unless" construction of the Nebraska statute which led the Supreme Court to conclude that its "unique structure and language" gave rise to due process rights in parole proceedings. *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100, 2106 (1979). *See Boothe* v. *Hammock*, *supra*, 605 F.2d at 664.

4 The statute provides in pertinent part:

> (a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

liese, *supra*, slip op. at 1608; *Boothe*, *supra*, 605 F.2d at 664; *Wagner v. Gilligan*, No. 77-3372 (6th Cir. 1979). *Compare Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (inmates had protected liberty interest in "good-time" credits where statute provided that such credits were to be forfeited only for serious misbehavior).

Statutory or constitutional language, however, is not the only ground upon which a legitimate expectation of liberty or property may rest. Such an expectation, with attendant due process rights, may also be based on regulations, policies, understandings, contractual arrangements or institutional practices. *See Perry* v. *Sindermann*, 408 U.S. 593, 601-03 (1972); *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577-78; *Morrissey* v. *Brewer*, 408 U.S. 471, 480-82 (1972). As we emphasized in *Pugliese*, *supra*, slip op. at 1605:

> Considerable weight is given to whether the alleged liberty interest is in the nature of a "bird in the hand" rather than one in the bush. A protected liberty interest is created, for example, where the inmate currently enjoys or may reasonably expect to enjoy an important and substantial benefit upon his compliance with or the occurrence of certain conditions, which may be withdrawn only for good cause.

Connecticut's life inmates contend that they have a legitimate expectation of pardon and release—and due process rights in pardon proceedings—by virtue of the regularity with which the Board of Pardons grants them relief. Though the statistical evidence provided below by state officials was not, as Judge Blumenfeld noted, "as extensive as might be desired," 432 F. Supp. at 1314, it was sufficient to establish that pardons are

granted to Connecticut's life inmates with compelling frequency. Bernard Gates, then chairman of the Board of Parole, testified that more than 75 percent of Connecticut's "lifers" have their eligibility for parole accelerated by the Board of Pardons. Ninety percent of these inmates are then granted parole within their first year of eligibility, and all are paroled after no more than a few years' wait. In addition, the board grants immediate release to a number of other life inmates by commuting their sentences to time served.[5]

After reviewing these statistics, Judge Blumenfeld concluded that "the long-term inmate's expectation of pardon is a justifiable one rooted in state practice [and] implicates a liberty interest requiring due process protections." 432 F. Supp. at 1314. We affirmed this conclusion on appeal, holding that "[t]his almost invariable practice creates . . . a liberty interest in the pardons process," 593 F.2d at 166, and we reaffirm it now. The overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected liberty interest in pardon proceedings. *See Perry* v. *Sindermann*, *supra*, 408 U.S. at 602-03 (state university professor had protected interest in continued employment if he could show that "the policies and practices of the institution" created an unwritten "common law" of tenure); *Phillips* v. *Bureau of Prisons*, 591 F.2d 966, 971 (D.C. Cir. 1979) ("consistent, positive action of government officials" allowing paralegals to

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5 *See* note 1 *supra*. Gates also testified that "no more than 10 or 15 percent" of Connecticut's life inmates serve their minimum terms. This may mean that the Board of Pardons grants relief to 85 or 90 percent of the inmates; on the other hand, the figure may include those who have died in prison or who for some other reason served less than their minimum terms without the board's assistance.

visit prisoners gave paralegals a protected interest in such visits); *Stretton* v. *Wadsworth Veterans Hospital*, 537 F.2d 361, 367 (9th Cir. 1976) ("we believe *Roth* recognized that rehire rates under some circumstances may evidence a 'common law' of employment to support the finding of a property interest"); *Schwartz* v. *Thompson*, 497 F.2d 430, 433 (2d Cir. 1974) ("[n]or is there any suggestion that the vast majority of staff attorneys are promoted to supervisory positions so as to create *de facto* 'right' to such advancement"). We find nothing in *Greenholtz* that precludes this holding.[6] Indeed, our opinion in *Pugliese* appears to contemplate this precise result. See slip op. at 1612.

A finding that life inmates have a legitimate expectation of pardon and release prior to the expiration of their minimum terms does not mean, however, that they have a legitimate expectation of pardon after a year in prison, or two years, or ten. Connecticut's life inmates may apply for relief from the Board of Pardons after serving a year in prison and may apply annually thereafter. To determine how many years an inmate must serve before his application is entitled to due process protection, it is necessary to determine at

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6 The defendants-appellants point out that the Supreme Court in *Greenholtz* had before it figures showing that the Nebraska parole board awarded discretionary parole to nearly 60 percent of eligible inmates. If statistical probability were enough to create a protected interest in prison release, they assert the Supreme Court would have so found in *Greenholtz*. The Court's failure to do so, they submit, means that probability alone is insufficient to invoke due process. This argument must be rejected. *Greenholtz* held that Nebraska inmates had a protected interest in parole proceedings because of statutory language. The Court, therefore, did not consider whether Nebraska's historical pattern of parole might also give rise to due process rights. The Court's silence on this issue—an issue which it had no need to reach and which had not been raised by the parties—is of no significance in this case.

what point inmates are vested with a protected interest in the pardons process, *i.e.*, when the probability that they will receive pardon and release becomes constitutionally significant.

Judge Blumenfeld twice explicitly declined to reach this question. In his first opinion, he saw no need to fix a precise point at which due process was implicated because the suit involved a single plaintiff, Dumschat, who had already served more than two-thirds of his minimum sentence and who, therefore, clearly had a legitimate expectation of pardon based on state practice.[7] In his second opinion, the district court judge again found it unnecessary to reach the question because he held the mere possibility of pardon generated due process rights. This conclusion, of course, is no longer tenable in light of *Greenholtz*, *Boothe*, and *Pugliese*. We therefore remand to the district court to determine how many years life inmates must serve before the probability of pardon becomes so significant as to give rise to a protected liberty interest. Only after this period has elapsed are lifers entitled to due process safeguards in the pardons process.

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7 Judge Blumenfeld remarked in a footnote that "it is not clear at exactly what point in their incarceration lifers generally receive a pardon." 432 F. Supp. at 1314 n.12. He then noted Bernard Gates's testimony that "I can't speak of it recently, but the bulk of commutations [for life inmates] over past years appeared to come between 14 and 17 years" of imprisonment. This was the only testimony below concerning the timing of pardons. Accordingly, we remand to Judge Blumenfeld who can obtain additional information on this question.

IV.

We turn, finally, to consider what procedural protection is due those life inmates in whom a liberty interest has vested. Specifically, we review, in light of *Greenholtz*, the district court's decision that a life inmate's due process rights require the Board of Pardons to provide a written explanation when it rejects his application for relief.[8]

Due process is a highly flexible doctrine. To determine what process is due in a particular case, a court must consider "the need for and usefulness of the particular safeguard in the given circumstances," Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1278 (1975), and its effect on governmental and private interests. *See, e.g., Greenholtz, supra*, 99 S.Ct. at 2106-08; *Mathews* v. *Eldridge*, 424 U.S. 319, 333-49 (1976); *Wolff* v. *McDonnell, supra*, 418 U.S. at 560-72; *Morrissey* v. *Brewer, supra*, 408 U.S. at 483-89. As we held in our previous opinion in this case, the record amply supports Judge Blumenfeld's conclusion that a mandatory statement of reasons has a number of salutary consequences. The need to give reasons encourages fair and thoughful deliberations by the board, thus protecting against arbitrary and constitutionally impermissible decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel.[9] Finally, it helps inmates to cor-

8 In his complaint, Dumschat sought not only a statement of reasons from the board but also access to all information available to the board in its consideration of his applications. This additional relief was not granted by Judge Blumenfeld. The claim to access was dropped in the consolidated suit and class action and is no longer at issue.

9 Thirteen different people sat on the five-person board between November 1973 and November 1976.

rect misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief.[10]

The record also supports Judge Blumenfeld's finding that a reasons requirement does not unduly burden the Board of Pardons. Indeed, the requirement involves only a small number of applicants before the board.[11] Further, the statements provided by the board need not be lengthy or detailed—the board should be able to summarize the grounds for its decision sufficiently in a sentence or two. Board chairman Paul McQuillan himself testified below that the reasons requirement would be workable and would present no great administrative difficulty.

Nothing in *Greenholtz* requires us to overrule Judge Blumenfeld's determination regarding the requirements of due process in this case. In fact, dicta in *Greenholtz* suggests support for Judge Blumenfeld's conclusion. The *Greenholtz* plaintiffs already were entitled to brief statements of reasons from the Nebraska parole board. They contended that due process required more detailed statements outlining the evidence relied on by the board in reaching its decision. The Supreme Court held that a brief statement of reasons was sufficient under the due process clause, further suggesting that a brief statement was not only constitutionally sufficient but also constitutionally *necessary*:

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10 On the benefits of a reasons requirement as a due process safeguard, *see generally*, *Wolff* v. *McDonnell*, 418 U.S. 539, 564-65 (1974); *Haymes* v. *Regan*, 525 F.2d 540, 543-44 (2d Cir. 1975).

11 Thirty-five inmates were serving life sentences in Connecticut prisons as of November 1977. Moreover, only those who have served long enough to have a protected interest in pardon—a length of time to be determined by the district court on remand—have a right to statements of reasons from the board.

> [W]hen parole is denied [the board] informs the inmate in what respects he falls short of qualifying for parole; *this affords the process that is due under these circumstances.*

99 S.Ct. at 2108 (emphasis added).

We hold that Connecticut life inmates who have a protected interest in the pardon process are entitled to the procedural safeguard which the Supreme Court considered "due" in *Greenholtz* — short statements of reasons explaining why they have been denied relief. We remand to the district court to determine at what point in their incarceration life inmates acquire a protected liberty interest in pardons.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 11, 1979

Stephen J. O'Neill
Assistant Attorney General
340 Capitol Avenue
Hartford, CT 06115

RE: Connecticut Board of Pardons, et al.
v. David Dumschat, et al.
No. 78-1533

Dear

The Court today entered the following order in the above-entitled case:

The motion of respondents for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Greenholtz v. Inmates of Nebraska Penal Complex, 442 U.S. (1979).

Very truly yours,

MICHAEL RODAK, JR., Clerk

RECEIVED
1979
ATTORNEY GENERAL'S OFFICE
340 CAPITOL AVE., HTFD

Michael Rodak, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 539, 540 — August Term, 1978.

(Argued January 9, 1979 Decided January 11, 1979.)

Docket Nos. 78-2124-25

DAVID DUMSCHAT,

Plaintiff-Appellee,

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Intervening Plaintiffs-Appellees,

v.

BOARD OF PARDONS, State of Connecticut; and RICHARD K. LUBLIN (Chairman), ALVIN DOZEMAN, PAUL J. DUBISSETTE, Members of the Board of Pardons,

Defendants-Appellants.

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON,

Plaintiffs-Appellees,

v.

BOARD OF PARDONS, State of Connecticut; and PAUL J. MCQUILLAN (Chairman), ALVIN DOZEMAN, MICHAEL E. DUBISSETTE, JOHN SPEZIALE, and PHILIP TATOIAN, Members of the Board of Pardons,

Defendants-Appellants.

B e f o r e:

KAUFMAN,

Chief Judge,

SMITH and OAKES,

Circuit Judges.

Appeal from declaratory judgment entered in the United States District Court for the District of Connecticut.

M. Joseph Blumenfeld, *Judge*, requiring statement of reasons by Connecticut Board of Pardons in case of denial of application for pardon by prisoners serving life terms. Affirmed.

STEPHEN J. O'NEILL, Assistant Attorney General (Carl R. Ajello, Attorney General of the State of Connecticut, of counsel), *for Appellants*.

STEPHEN WIZNER, New Haven, Conn. (Yale Legal Clinic, Dennis E. Curtis, Mary F. Keller, Alice Bussiere, Judith Resnik, of Counsel), *for Appellees*.

PER CURIAM:

On this appeal from a declaratory judgment of the United States District Court for the District of Connecticut in a class action requiring a statement of reasons by the Connecticut Board of Pardons in case of denial of application for pardon by prisoners serving life terms, we affirm essentially for the reasons given by Judge Blumenfeld in his opinions below, 432 F. Supp. 1310 (D. Conn. 1977), —— F. Supp. —— (Aug. 18, 1978).

Although pardons at first glance might appear to be different from parole decisions, the Connecticut statutory authority given to the Board of Pardons and its integral part in parole decisions make the two processes similar. The argument by appellants that pardons are solely discretionary decisions of mercy, relying on *Schick* v. *Reed*, 419 U.S. 256 (1974), is not well taken since *Schick* is based on the constitutional authority of the federal executive rather than on the processes of a statutory state board essentially determining the date of eligibility for consideration by another (parole) board.

Written statements of reasons for denial are part of the due process requirements surrounding parole decisions. *Coralluzzo* v. *New York State Parole Board*, 566 F. 2d 375 (2d Cir. 1977), *cert. dismissed*, 435 U.S. 912 (1978); *Zurak* v. *Regan*, 550 F. 2d 86 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977); and *Haymes* v. *Regan*, 525 F. 2d 540 (2d Cir. 1975). These cases are based on the expectations of inmates in regard to parole possibilities which lead to those inmates' acquiring some "liberty interest" in the parole process.

The facts are not seriously in dispute. The vast majority of those in the plaintiff class, a class composed of those serving life sentences, are granted relief by the Board of Pardons prior to the expiration of 20 years, the statutory minimum period (less time for good behavior) that lifers must ordinarily serve before they are eligible for parole. This almost invariable practice creates in the class a liberty interest in the pardons process. As thoughtfully explained in Judge Blumenfeld's opinions, the due process balancing in regard to decisions of the Board of Pardons is similar to that involving a parole board, and thus due process in the proceedings of the Board of Pardons in cases of inmates serving life sentences also requires written statements setting forth reasons for denial. Such statements would provide protection against arbitrary and constitutionally impermissible decisions by the Board by forcing the Board to articulate its reasons for denial. The Board would be encouraged to give more thoughtful consideration to each application. A statement of reasons for denial would aid an inmate in correcting any behavior which was considered negative by making him aware of such behavior. Finally, such statements would help the shifting membership of the Board to be more consistent in its decisions and would create no undue administrative burden.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DAVID K. DUMSCHAT, ET AL

v.

BOARD OF PARDONS OF THE
STATE OF CONNECTICUT, ET AL

CIVIL NO. H-76-102

MEMORANDUM OF DECISION

Background

This is a class action by the plaintiffs on behalf of themselves and all other inmates of the State of Connecticut who are currently serving sentences of life imprisonment at the Connecticut Correctional Institutions at Somers and at Enfield and who have been, or who will be, denied pardons during their current terms of incarceration by the defendant Connecticut Board of Pardons. The plaintiffs seek a declaratory judgment that the Due Process Clause of the fourteenth amendment to the United States Constitution entitles them to a written statement of reasons when they are denied pardons.

Plaintiff David Dumschat commenced the instant action in February 1976. At that time he was serving a sentence of life imprisonment at the Connecticut Correctional Institution at Enfield following a homicide conviction in 1964. Prior to February 1976, Mr. Dumschat had appeared before the Board of Pardons several times and had never been told why he had been denied a pardon.

On November 18, 1976, this court held an evidentiary hearing at which J. Bernard Gates, Chairman of the Connecticut Board of Parole, and Richard Lublin, then Chairman of the Board of Pardons, testified. Following addi-

tional submissions of written evidence by the defendants, on June 16, 1977, the court issued a declaratory judgment that Mr. Dumschat was entitled to a written statement of reasons when the board denied him a pardon. *Dumschat v. Board of Pardons*, 432 F. Supp 1310 (D. Conn. 1977). The defendants appealed the decision to the United States Court of Appeals for the Second Circuit. However, on June 16, 1977, Mr. Dumschat received a pardon. The defendants, therefore, did not pursue their appeal, but instead filed a motion with the Court of Appeals on August 16, 1977, requesting that the judgment of the District Court be vacated and that the case be remanded. On August 29, 1977, the defendants also filed a motion with this court to vacate the judgment and dismiss the complaint, and on September 13, 1977, the plaintiff consented to having the suit remanded to this court.

On December 20, 1977, while the two motions were pending, the plaintiff-intervenors, James Brown, Stanley Czaja, and James Shelton, filed a separate action claiming that their constitutional rights had been denied when the Board of Pardons denied them pardons without giving them statements of reasons. The three men were then, and are now, inmates at the Connecticut Correctional Institution at Enfield serving sentences of life imprisonment as a result of homicide convictions. Under the present sentences, Mr. Brown, Mr. Czaja, and Mr. Shelton will not be eligible for parole until 1987, 1982 and 1988 respectively. Conn. Gen. Stat. § 54-125, as amended P.A. 76-336 §7 (June 9, 1976). Each of them has been denied a pardon by the Board of Pardons at least twice, with the latest denials for Mr. Brown and Mr. Shelton being in October 1977, and the latest denial for Mr. Czaja being in May 1977. At no time have any of the plaintiff-intervenors been told by any of the defendants why their applications for pardons have been denied.

In January 1978, the Court of Appeals remanded the *Dumschat* suit without further instructions. Following this

court's denial of the defendants' motion to vacate the judgment and dismiss the complaint, the plaintiff-intervenors filed motions to intervene in *Dumschat*, to consolidate their action with *Dumschat*, and to have the consolidated suit certified as a class action. On March 9, 1978, an additional hearing was held at which the present Chairman of the Board of Pardons, Paul J. McQuillan, testified. After that hearing, the plaintiff-intervenors' motion to intervene, motion to have their cases consolidated with *Dumschat*, and motion for certification as a class action were granted.

Discussion

In a previous round on the issue of whether the constitution required the Board of Pardons to give a written statement of reasons to an inmate when he was denied a pardon, this court ruled that a written statement of reasons for the board's decision, including the facts upon which it relied, was constitutionally mandated. See *Dumschat v. Board of Pardons, supra*. That holding was based upon a determination that in view of the evidence that 75 percent of the inmates sentenced to long minimum terms who have served a substantial portion of that sentence do eventually receive some form of pardon from the board, the particular plaintiff acquired a justifiable expectation of pardon and a liberty interest sufficient to invoke the protection of the fourteenth amendment. In that case, I stated:

> "I need not decide on the facts of this case at what point in his incarceration an inmate acquires a justifiable expectation of pardon and a liberty interest sufficient to invoke the protection of the fourteenth amendment. I conclude only that due process attaches to the denial of a pardon to an inmate like Drumschat sentenced to life imprisonment who has served almost two-thirds of his minimum term."

Id., 432 F. Supp. at 1315 n.17.

The present case is certified as a class action for all inmates currently serving sentences of life imprisonment in Connecticut state facilities at Somers and Enfield. Therefore, the question whether an inmate must have served a certain portion of his minimum term before he "acquires a justifiable expectation of pardon and a liberty interest sufficient to invoke the protection of the fourteenth amendment," must now be considered.

In *Coralluzzo v. New York State Parole Board*, 566 F.2d 375 (2d Cir. 1977), *cert. dismissed as improvidently granted*, 46 U.S.L.W. 3553 (March 7, 1978), the Second Circuit decided the question whether the New York minimum period of imprisonment (MPI) procedure is subject to the Due Process Caluse of the fourteenth amendment. In holding that due process rights were implicated in the MPI proceeding, the Second Circuit ruled that the parole board must provide a written statement of reasons, including facts relied upon by the board, when it sets a MPI that exceeds the statutory minimum.

In *Coralluzzo* the state attempted to distinguish the MPI proceeding from various parole release situations where the court had conferred due process protection, see *United States ex rel. Johnson v. Chairman of New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974); *Zurak v. Regan*, 550 F.2d 86 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977). The state argued that because the prisoner has no reason to expect "imminent liberty," the MPI procedure implicates only a "very tenuous" liberty interest. The Court of Appeals said:

> "[W]e find no indication either in *Johnson* or in the Supreme Court's recent decisions dealing with liberty interests of prisoners, see *Meachum v. Fano*, 427 U.S. 215, 224-25 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 555-58 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972), that a substantial possibility of im-

> mediate release is the sine qua non of a cognizable liberty interest. To draw the constitutional line where the statistics show it to be more likely than not that the particular proceeding will result in immediate release could risk insulating from due process protection those stages of the parole release process which as a practical matter most seriously affect a prisoner's liberty interest."

Therefore, because an inmate's liberty interest is seriously affected by the pardon procedure, I need not "draw the constitutional line" in the present action. In a pardon hearing of an inmate sentenced to life imprisonment, the Due Process Clause protects the inmate's interest in obtaining reasons for denial of pardon irrespective of the time served on his sentence when his pardon application is considered.

After hearing the testimony of the present Chairman of the Board of Pardons, it appears that the conditions present at the time of my original decision on this matter continue to exist without interruption or change. Therefore, in all respect, I adhere to my prior decision in this matter and rule that the Connecticut Board of Pardons furnish any member of the plaintiff class a written statement of reasons and the facts relied on when he is denied a pardon.

SO ORDERED.

Dated at Hartford, Connecticut, this 18th day of August, 1978.

M. JOSEPH BLUMENFELD
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DAVID DUMSCHAT

Plaintiff

JAMES BROWN, STANLEY CZAJA and JAMES SHELTON

Intervening Plaintiffs

v.

BOARD OF PARDONS, State of Connecticut; and RICHARD K. LUBLIN (Chairman), ALVIN DOZEMAN, PAUL J. McQUILLAN, JOHN P. COTTER, and MICHAEL E. DuBISSETTE, individually and in their capacities as members of the Board of Pardons

Defendants

CIVIL NO. H76-102

JUDGMENT

The above-identified action having come on for rehearing before the Court by the Honorable M. Joseph Blumenfeld, United States District Judge, after remand from the Court of Appeals; and,

The Court, having certified the action as a class action and after a hearing on the intervening Plaintiffs' requests for relief, filed its Memorandum of Decision ruling that the Connecticut Board of Pardons furnish any member of the Plaintiff class a written statement of reasons and the facts relied upon when such member of the Plaintiff class is denied a pardon by the Board.

It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter for the Plaintiff class and that the Connecticut Board of Par-

dons furnish any member of the Plaintiff class a written statement of reasons and facts relied upon when such member of the Plaintiff class is denied a pardon by the Board.

Dated at Hartford, Connecticut, this 22nd day of September, 1978.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: WILLIAM D. TEMPLETON
Chief Deputy

APPROVED:

M. JOSEPH BLUMENFELD
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JAMES BROWN, STANLEY CZAJA
and JAMES SHELTON

v.

BOARD OF PARDONS, State of Connecticut, and PAUL J. McQUILLAN (Chairman), ALVIN DOZEMAN, MICHAEL E. DuBISSETTE, JOHN SPEZIALE, and PHILIP TATOIAN, Members of the Board of Pardons

CIVIL ACTION NO. H77-657

JUDGMENT

The above-identified action came on for consideration by the Court by the Honorable M. Joseph Blumenfeld, United States District Judge; and,

The Court having consolidated this action with co-pending Civil No. H76-102 for disposition; and,

The Court having granted the Plaintiffs' Motion to Intervene in said co-pending action, Civil No. H76-102; and,

The Court, after a hearing in said consolidated actions on the intervening Plaintiffs' requests for relief, filed its Memorandum of Decision ordering that the Connecticut Board of Pardons provide any member of the Plaintiff class a written statement of reasons and facts relied upon when such member is denied a pardon by the Board;

It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter for the Plaintiffs and that the Connecticut Board of Pardons provide any member of the Plaintiff class with a written

statement of reasons and facts relied upon when such Plaintiff class member is denied a pardon by the Board.

Dated at Hartford, Connecticut, this 22nd day of September, 1978.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court

By: WILLIAM D. TEMPLETON
Chief Deputy

APPROVED:

M. JOSEPH BLUMENFELD
United States District Judge

Supreme Court, U.S.
FILED
NOV 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

DAVID DUMSCHAT
Respondent

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Intervening Respondents

CONNECTICUT BOARD OF PARDONS, ET AL
Petitioners

v.

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

CARL R. AJELLO
Attorney General
30 Trinity Street
Hartford, Connecticut

STEPHEN J. O'NEILL
Assistant Attorney General
340 Capitol Avenue
Hartford, Connecticut 06106
(203) 566-2832
Counsel for Petitioners

STEPHEN WIZNER
127 Wall Street
New Haven, Conn. 06520
(203) 436-2210
Counsel for Respondents

PETITION FOR CERTIORARI FILED JUNE 18, 1980.
CERTIORARI GRANTED OCTOBER 14, 1980.

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1.

RELEVANT DOCKET ENTRIES[1]

H76-102 DUMSCHAT VS BOARD OF PARDONS

DATE	NR.	PROCEEDINGS
1976		
2-24	1	Motion to proceed in forma pauperis filed. "motion granted" Blumenfeld, J. m 2-2.
2-24	2.	Complaint filed.
2-24	3.	Law Student Intern Appearance Form. Appearance approve, Blumenfeld, J. m 2-26
2-27		Summons issued and together with same and copies of complaint and attested copies of motion to proceed in forma pauperis handed to Marshal for service.
3-4	4	Marshal's return showing service on all defs.
3-31	5	Appearance of Stephen J. O'Neill entered for defs.
3-31	6	Answer of Defs.
4-1		Placed on trial list.
4-2	7	Motion for Leave to File Amended Complaint.
4-12		Motion to amend granted. Blumenfeld, J. m 4-13-76. Copies to counsel.
4-12	8	Amended Complaint filed.
10-15	9	Stipulation of Facts filed.
11-18		Hearing on Merits - Student Intern Appearance Form re appearance of Jack Hanley filed to represent deft. Amended Stipulation of Facts signed by atty's. for parties. Def. witness sworn & testified. Pltf's. witness sworn & testified. Testimony of def's witness filed in Civ.

[1]In the District Court for the District of Connecticut, Dumschat v. Board of Pardons, et al; H76-102 was consolidated with James Brown, et al v. Board of Pardons, et al; H-77-657. The District entries in each action are printed herein.

DATE	NR.	PROCEEDINGS
		H-74-377 filed in this case as Def's. Exh.A. Pltf's. exh. #1 filed. Briefs parties in three weeks after receipt of transcript. Exhibits with file. (Blumenfeld, J.)
12-17	10	Plaintiff's Brief.
1977		
1-24	11	Defendant's Brief
3-4	12	Affidavit of J. Bernard Gates.
3-4	13	Affidavit of Lawrence Schwartz and Exhibit A attached.
6-16	14	MEMORANDUM OF DECISION' Blumenfeld J. m 6/16/77 (declaratory judgment for the pltf.) Copies mailed.
6-24	15	JUDGMENT entered. Blumenfeld J. m 6/27/77 Copies mailed.
7-6	16	Notice of Appeal filed. Copies mailed. to counsel. Certified copies of notice and docket entries mailed to U.S Court of Appeals and New Haven. Civil management plan and Forms C & D handed to Atty O'Neill.
7-6	17	Bond for Costs on Appeal filed.
7-18	18	Acknowledgement from USCA on document mailed to 7-7-77.
7-15		Record on Appeal mailed to U.S. Court of Appeals.
8-29	19	Motion to Vacate Judgment filed by deft.
1978		
1-12		END. ON motion #19 DENIED although this was not a close action in effect it should be so treated because the same issue regularly recurs. MJB m1-13-78 Copies mailed.
1-16	20	Mandate from the U.S.C. Appeals dated 1/12/78 "The appellant having moved to vacate the judgment of the District Court and to remand

DATE	NR.	PROCEEDINGS
		the action to the District Court and the appellee having consented to the remand it is Ordered that the action be and it hereby is remanded to the U.S. District Court for the District of Conn.
1-16		CASE REOPENED
1-19		File returned from US Court of Appeals
2-17	21	Motion for Certification of a Class Action.
2-17	22	Mo. to Consolidate and Intervene (H77-657), filed by Pltf.
2-17	23	Memo. in Support of Mo. to Consolidate and Intervene, and Motion for Certification of a Class Action.
3-9		END. on #21 motion granted on the basis of a finding that the allegations of the motions are established. MJB m3/9/78 Copies mailed. Copies mailed.
3-9		HEARING re: Additional Hearing on the Merits - Pltfs' Motion to Consolidate and to Intervene - Granted; Pltf's Motion to Admit Law Student Appearance for John Hanley - Granted; Three Law Student Intern Appearance Forms, filed. One Def's witness sworn and testified. Motion for Certification of Class Action - Granted. Order that briefs be filed.
3-9	24	ORDER maintaining action as a class action. Blumenfeld, J. m3-10-78. Copies mailed.
3-16		End. on dckt #22, "Both motions are granted. 3-16-78." Blumenfeld, J. M.3-17-78. Copies sent to counsel of record. (consolidated with Civil H-77-657)
4-12	25	PLAINTIFF'S BRIEF FILED
5-1	26	Answer to Verified Complaint, filed.
5-1	27	Defendants' Brief, filed.
5-1	28	Stipulation re: certain facts, filed.
5-4		Court reporters notes of proceedings held on 3-9-78 filed. (Col)

DATE	NR.	PROCEEDINGS
8-18	29	MEMORANDUM OF DECISION, MJB m 8-18-78. Copies mailed. (adhere to prior decision, for pltf)
9-22	30	JUDGMENT entered. MJB m9-22-78. Copies mailed.
9-26	31	Transcript of Hearing held on 3/9/78. Collard, R.
9-29	32	Notice of Appeal filed by deft. Copies to counsel. Civil Management Plan & Forms C & D mailed to Atty O'Neill. Attested copies of notice of Appeal mailed to US. Court of Appeals and New Haven.
9-29	33	Bond for Costs on Appeal filed. (Surety bond for $250.00)
11-7		Record on Appeal mailed to the U.S Court of Appeals
1979		
2-7		Two volumes of record on appeal received from USCA.
2-6	34	Mandate dated 1-11-79 affirming judgment of District Court with costs to be taxed against the appellants.

Brown v. Board of Pardons **Civil H-77-657**

DATE	NR.	PROCEEDINGS
1977		
12-23	1	Motion For Leave to Proceed in Forma Pauperis with endorsement thereon, "Motion granted. Dec. 23, 1977." Blumenfeld, J. M.12-29-77. Copy sent to pltf.
12-23	2	Affidavit of James Brown.
12-23	3	Affidavit of Stanley Czaja.
12-23	4	Affidavit of James Shelton.
12-23	5	Complaint, filed.
12-23	6	Motion For Certification of Class Action.
12-23		Summons issued together with copies of Motion to Proceed, Affidavits, Complaint and Motion For Certification and handed to US Marshal for service.
1978		
1-3	7	Marshal's returns showing service on all Defs. (12-29-77).
1-17	8	Appearance of Stephen J. O'Neill entered for Defs.
1-17	9	Answer filed.
1-19		Placed on trial list.
1-24	10	Interrogatories filed by Pltfs. as to Def. Conn. Board of Pardons.
2-17	11	Motion to Amend Complaint.
2-17	12	Motion for Certification of a Class Action.
2-17	13	Motion to Consolidate and Intervene.
2-17	14	Memo. in Support of Mo. to Consolidate and Intervene, and Mo. for certification of a Class Action.
2-22	15	Motion for Enlargement of Time to respond to Pltf's Interrogatories until 3-16-78.

DATE	NR.	PROCEEDINGS
2-25		Motion for Enlargement of Time, Ordered Accordingly. (Markowski, C.) m. 2-27-78. Copies mailed.
3-9		End. on dkt #12 "motion granted on the basis of a finding that the allegations of the motions are established. MJB m3/9/78. Copies mailed.
3-9	16	Law Student Appearance (John Hanley) Approved, MJB m3/10/78 Copies mailed.
	17	Law Student Appearance (John Hanley) Approved, MJB m3/10/78 Copies mailed.
	18	Law Student Appearance (John Hanley) APPROVED, MJB m3/10/78 Copies mailed.
3-9	19	ORDER, MJB m3/10/78 (class action) Copies mailed.
3-16		End. on dckt. #12 - "Both motions are granted. 3-16-78." Blumenfeld, J. M.3-17-78. Copies sent to counsel of record. (consolidated with Civil H-76-102)
4-21	20	Plaintiffs' Brief filed.
5-1	21	Answer to Verified Complaint, filed by Defs.
5-1	22	Defendants' Brief, filed.
5-1	23	Stipulation re: certain facts, filed.
9-22	24	JUDGMENT entered. MJB m9-22-78. Copies mailed.
9-29	25	Notice of Appeal filed. by deft. Copies to counsel. Attested copies. Of Notice of Appeal and Docket entries mailed to U.S. Court of Appeals and New Haven. Civil Management Plan & Forms C & D mailed to Atty. O'Neill.
9-29	26	Bond for Costs on Appeal filed. (Surety Bond for $250.00)
11-7		Record on Appeal mailed to U.S. Court of Appeal
1-17-79		Appearance of Stephen Wizner for the pltf
2-7-79		One volume of Record on Appeal received from USCA.

DATE	NR.	PROCEEDINGS
4-14	27	Mandate dated 3/20/80 from the USCA "On consideration whether it is now hereby ordered adjudged and decreed that the judgment of said District Court be and it hereby is affirmed and the action be and it hereby is remanded to said district court for further proceedings in accordance with the opinion of this court with cost to be taxed against the appellants. FUSARO, CLERK, (Kaufman, Smith, and Oakes)
5-21		CASE REOPENED

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES BROWN,
STANLEY CZAJA, and
JAMES SHELTON,

Plaintiffs,

vs

BOARD OF PARDONS, State of
Connecticut, and
PAUL J. MCQUILLAN (Chairman),
ALVIN DOZEMAN,
MICHAEL E. DUBISSETTE,
JOHN SPEZIALE, nad
PHILIP TATOIAN, Members of
the Board of Pardons,

Defendants.

CIVIL NO.
77-657

VERIFIED

COMPLAINT

Plaintiffs, by their attorneys, complaining of Defendants allege:

I.

1. This is a class action for declaratory judgment on behalf of all inmates of the State of Connecticut who are currently serving sentences of life imprisonment at the Connecticut Correctional Institutions at Somers and at Enfield and who have been denied pardons during their current terms of incarceration by the Connecticut Board of Pardons. The Plaintiffs challenge the constitutionality of the procedure used by the Board of

Pardons for informing inmates serving life sentences that their applications for pardons have been denied.

2. This action is brought pursuant to Title 42, United States Code, §1983, to secure rights, privileges, and immunities guaranteed by the Fourteenth Amendment to the United States Constitution; pursuant to Title 28, United States Code, §§2201 and 2202, relating to declaratory judgments; and pursuant to Rule 23, Federal Rules of Civil Procedure, relating to class actions.

3. Jurisdiction is conferred on this court by Title 28, United States Code, §1343.

II.

4. Plaintiffs sue on behalf of all inmates of the State of Connecticut who are currently serving sentences of life imprisonment at the Connecticut Correctional Institutions at Somers and at Enfield and who have been denied pardons during their current terms of incarceration by the Connecticut Board of Pardons.

5. On information and belief, there are approximately thirty-five members of this class of inmates, and therefore joinder of all members is impracticable.

6. The named Plaintiffs challenge a general policy and practice of the Connecticut Board of Pardons, namely the Board's failure to give written statements of reasons to inmates serving life sentences, whenever the Board denies these inmates' applications for pardons. This policy and practice is applied to all members of the Plaintiff class. Therefore this action presents both questions of law and fact which are common to members of the Plaintiff class.

7. The Connecticut Board of Pardons implements the

procedure challenged by the named Plaintiffs in this action without regard to the individual characteristics or circumstances of an inmate who has applied for a pardon. Therefore, the claims of the named Plaintiffs are typical of and indentical to the claims of the other members of the Plaintiff class.

8. The named Plaintiffs have no present or potential interest which conflicts with the present or potential interests of the other members of the Plaintiff class. They will fairly and adequately represent the interests of the class.

9. The Defendants in this action have acted and refused to act on grounds generally applicable to the Plaintiff class and have thereby made appropriate final declaratory relief with respect to that class as a whole.

III.

10.(a) Defendant Paul J. McQuillan is the Chairman of the Connecticut Board of Pardons.

(b) Defendants Alvin Dozeman, John Speziale, Philip Tatoian and Michael E. DuBissette are members of the Connecticut Board of Pardons.

11.(a) The Board of Pardons is an administrative body empowered to grant both absolute and conditional pardons to Connecticut inmates pursuant to Title 18, Connecticut General Statutes §26.

(b) In almost all cases in which relief is granted to inmate applicants, the Board of Pardons grants only conditional pardons, reducing the applicants' minimum sentences in order to permit earlier eligibility for parole.

12. The majority of inmates serving life sentences in Connecticut during recent years have received conditional pardons before becoming eligible for parole.

13. Almost all of the inmates serving life sentences in Connecticut who have received pardons during recent years have been paroled in their first appearances before the Connecticut Board of Parole.

14. On information and belief, the Board of Pardons does not have any articulated standards for decisionmaking.

15. There has been a rapid change in membership on the Board of Pardons since 1970.

16. On information and belief, the Board of Pardons does not apply consistent decisionmaking criteria to both the applications for pardons made by different applicants and to the successive applications made by the same applicant.

IV.

17. Plaintiff James Brown is an adult citizen of the United States and is currently incarcerated at the Connecticut Correctional Institution at Enfield. His inmate identification number is 23121.

18. On or about November 11, 1967, Plaintiff Brown was convicted of murder in the second degree in the Connecticut Superior Court at Bridgeport. Following a successful appeal of that conviction, on or about March 14, 1969, Plaintiff was convicted of murder in the first degree in the Superior Court.

19. Plaintiff Brown was sentenced to a term of imprisonment of from twenty-five years to life and will become eligible for parole in or about 1987.

20. Plaintiff Brown has been incarcerated since on or about May 12, 1967. From on or about May 12, 1967, until on or about November 11, 1967, Plaintiff was incarcerated in the Bridgeport Jail. From on or about November 11, 1967, until in or about November, 1974, Plaintiff was an inmate at the Connecticut Correctional Institution at Somers. In or about November, 1974, Plaintiff was transferred to the Connecticut Correctional Institution at Enfield.

21. Plaintiff Brown has compiled a good institutional record during the period of his incarceration:

(a) Plaintiff has had no disciplinary citations.

(b) Plaintiff has participated continuously in the institutional furlough program since in or about 1975.

(c) Plaintiff has been employed at the institutions. Since in or about 1974 he has been working in the shipping and receiving department at the Connecticut Correctional Institution at Enfield, and before that he worked in the drycleaning department at the Connecticut Correctional Institution at Somers.

(d) Plaintiff has been attending classes since in or about 1974 in order to obtain an elementary school education.

(e) Plaintiff has learned woodworking in the hobby shop at the institution.

22. Plaintiff Brown appeared before the Connecticut Board of Pardons on October 3, 1977, and applied for a conditional pardon, so that his parole eligibility date would be advanced.

23. At or about six o'clock p.m. on October 3, 1977, Plaintiff Brown was given a slip of paper from the Board of Pardons stating that the Board had denied his application. He was not told why his application had been denied.

24. Plaintiff Brown subsequently requested that the Board of Pardons give him a statement of reasons for the denial of his application.

25. In response, Burton S. Yaffie, Secretary of the Board of Pardons sent Plaintiff Brown a letter, dated October 7, 1977 (attached hereto as Exhibit A), which stated that the question of whether an applicant denied a pardon has a constitutional right to a statement of reasons was an undecided question.

26. The October, 1977 hearing was Plaintiff Brown's second appearance before the Board of Pardons. On May 3, 1976, the Board also denied the Plaintiff's application for a pardon without giving him a statement of reasons.

V.

27. Plaintiff Stanley Czaja is an adult citizen of the United States and is currently incarcerated at the Connecticut Correctional Institution at Enfield. His inmate identification number is 20319.

28. On or about December 12, 1962, Plaintiff Czaja was convicted of murder in the second degree, in the Connecticut Superior Court at Middletown.

29. Plaintiff Czaja was sentenced to a term of imprisonment of from twenty-five years to life and will become eligible for parole in or about 1982.

30. Plaintiff Czaja has been incarcerated since on or about August 6, 1962. From on or about August 6, 1962, until on or about December 12 1962, Plaintiff was incarcerated at the Haddam Jail. From on or about December 12, 1962, until on or about November 3, 1963, Plaintiff was an inmate at the Wethersfield State Prison. From on or about November 3, 1963, until in or about 1970, Plaintiff was an inmate at the Connecticut Correctional Institution at Somers. In or about 1970, Plaintiff was transferred to the Connecticut Correctional Institution at Enfield.

31. Plaintiff Czaja has compiled a good institutional record during the period of his incarceration:

(a) Plaintiff has had no disciplinary citations.

(b) Plaintiff has participated continuously in the institutional furlough program since in or about 1970.

(c) Plaintiff has been employed at the institutions in the following positions during the following approximate dates:

1. tierman, 1962-1964;

2. clerk and janitor in Supervising Captain's office, 1964-1967;

3. statewide truckdriver, 1967-71;

4. worker at the commissary, 1971-1976;

5. head of the institutional library, 1976 to the present.

(d) Plaintiff has been a member of Alcoholics Anonymous since in or about 1967.

32. Plaintiff Czaja appeared before the Connecticut Board of Pardons on May 2, 1977, and applied for a conditional pardon, so that his parole eligibility date would be advanced.

33. At or about six o'clock p.m. on May 2, 1977, Plaintiff Czaja was given a slip of paper from the Board of Pardons stating that the Board had denied his application. He was not told why his application had been denied.

34. On October 12, 1977, Plaintiff Czaja wrote a letter to Burton S. Yaffie, Secretary of the Board of Pardons, requesting a statement of reasons for the denial of the Plaintiff's application for a pardon.

35. In response, Mr. Yaffie sent Plaintiff Czaja a letter, dated October 17, 1977, (attached hereto as Exhibit B), stating that Mr. Yaffie was not authorized to give Plaintiff a statement of reasons.

36. The May, 1977, hearing was Plaintiff Czaja's third appearance before the Board of Pardons. After each of the Plaintiff's previous two appearances, the first being in or about 1974, the Board also denied the Plaintiff's applications for a pardon without giving him a statement of reasons.

VI.

37. Plaintiff James Shelton is an adult citizen of the United States and is currently incarcerated at the Connecticut Correctional Institution at Enfield. His inmate identification number is 23068.

38. On or about February 21, 1969, Plaintiff Shelton was convicted of murder in the first degree in the Connecticut Superior Court at Bridgeport.

39. Plaintiff Shelton was sentenced to a period of imprisonment of from twenty-five years to life and will become eligible for parole in or about 1988.

40. Plaintiff Shelton has been incarcerated since on or about September 1, 1968. From on or about September 1, 1968, until on or about February 21, 1969, Plaintiff was incarcerated in the Bridgeport Jail. From on or about February 21, 1969, until in or about 1972, Plaintiff was an inmate of the Connecticut Correctional Institution at Somers. In or about 1972, Plaintiff was transferred to the Connecticut Correctional Institution at Enfield.

41. Plaintiff Shelton has compiled a good institutional record during the period of his incarceration:

(a) Plaintiff has had no disciplinary citations.

(b) Plaintiff has participated continuously in the institutional furlough program since in or about 1972.

(c) Plaintiff has been employed at the institutions. Since in or about 1972 he has worked as a porter, cleaning the barracks for the officers who work at the Connecticut Correctional Institutions at Somers and at Enfield. While he has been working in this position, the institutional authorities have entrusted Plaintiff with the keys to all of the officers' rooms.

(d) Plaintiff has been a member of Alcoholics Anonymous for about five years.

(e) Plaintiff has been on trips outside of the institution, accompanied by officers, to watch plays and tennis matches in Hartford.

(f) Plaintiff has learned woodworking in the hobby shop at the institution.

42. Plaintiff Shelton appeared before the Connecticut Board of Pardons on October 3, 1977, and applied for a conditional pardon, so that his parole eligibility date would be advanced.

43. At or about six o'clock p.m. on October 3, 1977, Plaintiff Shelton was given a slip of paper from the Board of Pardons stating that the Board had denied his application. He was not told why his application had been denied.

44. On October 9, 1977, Plaintiff Shelton wrote a letter to Burton S. Yaffie, Secretary of the Board of Pardons, requesting a statement of reasons for the denial of Plaintiff's application for a pardon.

45. In response, Mr. Yaffie sent Plaintiff Shelton a letter, dated October 17, 1977, (attached hereto as Exhibit C), stating that Mr. Yaffie was not authorized to give Plaintiff a statement of reasons.

46. The October, 1977, hearing was Plaintiff Shelton's eighth appearance before the Board of Pardons. After each of the Plaintiff's seven previous appearances, the first being in or about 1970, the Board also denied the Plaintiff's applications for a pardon without giving him statements of reasons.

VII.

47. As a result of the failure and refusal of the Connecticut Board of Pardons to provide Plaintiffs with statements of reasons for the denials of their applications for pardons:

(a) Plaintiffs and reviewing courts cannot be sure that the reasons for the denials are not arbitrary and discriminatory;

(b) Plaintiffs do not know whether the Board members have carefully considered their applications;

(c) Plaintiffs do not know whether the Board has been applying consistent decisionmaking criteria to each of their successive applications;

(d) Plaintiffs do now know what they can do while they are incarcerated in order to improve the merits of their applications for pardons.

48. The actions of the Defendants under color of state laws, customs, and usage have deprived Plaintiffs of the right to due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court:

1. Enter a declaratory judgment declaring (a) that the procedure currently used by the Connecticut Board of Pardons for informing members of the Plaintiff class that their applications for pardons have been denied violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and (b) that all members of the Plaintiff class are entitled to a written statement of reasons from the Board of Pardons whenever the Board denies their applications for pardons.

2. Grant to the Plaintiffs and the members of their class such other relief as the Court deems appropriate and just.

THE PLAINTIFFS

By: STEPHEN WIZNER
MARY F. KELLER
DENNIS E. CURTIS
JUDITH RESNIK
127 Wall Street
New Haven, Connecticut 06520
(203) 436-2210

STATE OF CONNECTICUT
Board of Pardons

OFFICE OF SECRETARY

BURTON S. YAFFIE, ESQ
340 FAIRFIELD AVENUE, SUITE 203
BRIDGEPORT, CONNECTICUT 06604
(203) 333-0272

October 7, 1977

Mr. James Brown
Box G
Hazardville Station
Enfield, Connecticut 06082

RE: Inmate Session
October 3, 1977
My File No. 77-486

Dear Mr. Brown:

The Connecticut Board of Pardons is presently engaged in litigation to determine whether or not the Board is required to give a statement of reasons and facts relied upon when denying an application for a pardon.

In this litigation, the Board of Pardons is being represented by the Attorney General's Office. Until this litigation is concluded, the issue of whether or not the applicant for a pardon has a constitutional right to such statement, is still an open question.

Very truly yours,

Burton S. Yaffie, Secretary
State Board of Pardons

BSY:rr

EXHIBIT A

STATE OF CONNECTICUT
Board of Pardons

OFFICE OF SECRETARY

BURTON S. YAFFIE, ESQ
340 FAIRFIELD AVENUE, SUITE 203
BRIDGEPORT, CONNECTICUT 06604
(203) 333-0272

October 17, 1977

Mr. Stanley J. Czaja #20319
Box G
Hazardville Station
Enfield, Connecticut 06082

RE: Board of Pardons
October 3rd Session

Dear Mr. Czaja:

Please be advised that I am not at liberty to provide any further information to you relative to your petition for pardon other than the fact that the requested pardon was denied. Our minutes do not reflect a statement of reasons for such denial. I have been instructed by the Attorney General's Office that the Dumschat matter is on appeal and that there will be no change in policy until a final determination of the Dumschat matter has been resolved.

I am sending a copy of this letter to Attorney Stephen O'Neill for his information along with a photostatic copy of your letter of October 12, 1977. If any further information is available to you, it will be supplied by the Attorney General's Office or upon their instructions. I am sorry that I cannot be more helpful to you at this time.

Very truly yours,

Burton S. Yaffie

Burton S. Yaffie, Secretary
State Board of Pardons

BSY:rr

cc: Stephen O'Neill

EXHIBIT B

STATE OF CONNECTICUT
Board of Pardons

OFFICE OF SECRETARY

BURTON S. YAFFIE, ESQ
340 FAIRFIELD AVENUE, SUITE 203
BRIDGEPORT, CONNECTICUT 06604
(203) 333-0272

October 17, 1977

Mr. James Shelton #23068
Box G, Hazardville
Enfield, Connecticut 06082

RE: Board of Pardons
October 3rd session

Dear Mr. Shelton:

I am in receipt of your letter of October 9, 1977. Unfortunately, I have been advised by the Attorney General's Office that I am not authorized to issue any further information relative to the decision of the Board and therefore cannot answer your question. The minutes merely reflect that your petition was denied and do not set forth any specific reasons for such denial. No petitioner received a statement of reasons.

I am sending a copy of this letter to Attorney Stephen J. O'Neill, Attorney General's Office, for his information along with a photostatic copy of your letter of October 9th, 1977.

Very truly yours,

Burton S. Yaffie

Burton S. Yaffie, Secretary
State Board of Pardons

BSY:rr

cc: Stephen J. O'Neill

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES BROWN,
STANLEY CZAJA, and
JAMES SHELTON,

Plaintiffs,

vs

BOARD OF PARDONS, State of Connecticut, and
PAUL J. MCQUILLAN (Chairman),
ALVIN DOZEMAN,
MICHAEL E. DUBISSETTE,
JOHN SPEZIALE, and
PHILIP TATOIAN,
Members of the Board of Pardons,

Civil No.

Defendants.

VERIFICATION

State of Connecticut)
) ss.:
County of Tolland)

JAMES BROWN, being duly sworn, deposes and says, that he has read the foregoing complaint, and that the allegations contained therein concerning him are true of his own knowledge, except that as to those allegations made on information and belief he believes them to be true.

JAMES BROWN

Sworn to before me this 7th
day of December, 1977

RAYMOND GREGOR
Notary Public

My Commission Expires March 31, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES BROWN,
STANLEY CZAJA, and
JAMES SHELTON,

Plaintiffs,

vs

BOARD OF PARDONS, State of
Connecticut, and
PAUL J. MCQUILLAN (Chairman),
ALVIN DOZEMAN,
MICHAEL E. DUBISSETTE,
JOHN SPEZIALE, and
PHILIP TATOIAN,
Members of the Board
of Pardons,

Civil No.

Defendants.

VERIFICATION

State of Connecticut)
) ss.:
County of Tolland)

STANLEY CZAJA, being duly sworn, deposes and says, that he has read the foregoing complaint, and that the allegations contained therein concerning him are true of his own knowledge, except that as to those allegations made on information and belief he believes them to be true.

STANLEY CZAJA

Sworn to before me this 12th
day of December, 1977

TERIEN P. JOHNSON
Notary Public

My Commission Expires March 1982

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES BROWN,
STANLEY CZAJA, and
JAMES SHELTON,

Plaintiffs,

vs

BOARD OF PARDONS, State of
Connecticut, and
PAUL J. MCQUILLAN (Chairman),
ALVIN DOZEMAN,
MICHAEL E. DUBISSETTE,
JOHN SPEZIALE, and
PHILIP TATOIAN,
Members of the Board
of Pardons,

Civil No.

Defendants.

VERIFICATION

State of Connecticut)
) ss.:
County of Tolland)

JAMES SHELTON, being duly sworn, deposes and says, that he has read the foregoing complaint, and that the allegations contained therein concerning him are true of his own knowledge, except that as to those allegations made on information and belief he believes them to be true.

JAMES SHELTON

Sworn to before me this 7th
day of December, 1977

RAYMOND GREGOR
Notary Public

My Commission Expires March 31, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES BROWN, et al.,

Plaintiffs,

vs

Civil No.
H-77-657

BOARD OF PARDONS, et al.,

Defendants.

MOTION TO AMEND COMPLAINT

Plaintiffs move to amend their Complaint by deleting paragraphs 1, 4, 31(b), and 38, and substituting in their place:

1. This is a class action for declaratory judgment on behalf of all inmates of the State of Connecticut who are currently serving sentences of life imprisonment at the Connecticut Correctional Institutions at Somers and at Enfield and who have been, or who will be, denied pardons during their current terms of incarceration by the Connecticut Board of Pardons. The Plaintiffs challenge the constitutionality of the procedure used by the Board of Pardons for informing inmates serving life sentences that their applications for pardons have been denied.

4. Plaintiffs sue on behalf of all inmates of the State of Connecticut who are currently serving sentences of life imprisonment at the Connecticut Correctional Institutions at Somers and at Enfield and who have been, or who will be, denied pardons during their current terms of incarceration by the Connecticut Board of Pardons.

31(b). Plaintiff has participated continuously in the institution furlough program since in or about 1972.

38. On or about February 21, 1969, Plaintiff Shelton was convicted of murder in the second degree in the Connecticut Superior Court at Bridgeport.

The reasons for the amendments are to expand the proposed class to include all persons whose interests may be affected by this litigation, and to correct certain allegations.

THE PLAINTIFFS
By: STEPHEN WIZNER
DENNIS E. CURTIS
MARY F. KELLER
JUDITH RESNIK
Their Attorneys
127 Wall Street
New Haven, Connecticut 06520
(203) 436-2210

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Amend Complaint was mailed, postage prepaid and properly addressed, to Stephen O'Neill, Esq., 340 Capitol Avenue, Hartford, Connecticut 06115, Attorney for Defendants, this 17 day of February, 1978.

STEPHEN WIZNER

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAMES BROWN, et al — Civil No. H-77-657

v.

BOARD OF PARDONS, et al

DAVID DUMSCHAT — Civil No. H-76-102

v.

BOARD OF PARDONS, et al

ANSWER TO
VERIFIED COMPLAINT

1. Paragraphs I.1, I.2 and I.3 are admitted.

2. Paragraphs II.4, II.5, II.6, II.7, II.8 and II.9 are admitted.

3. Paragraphs III.10(a), III.10(b) and III.11(a) are admitted.

4. Paragraph III.11(b) is admitted to the extent that it alleges that in almost all cases in which relief is granted to inmate applicants, the action of the Board of Pardons reduces the applicant's minimum sentence in order to permit earlier eligibility for parole. The remainder of this paragraph is denied.

5. Paragraph III.12 is denied and Paragraph III.13 is admitted.

6. Paragraphs III.14, III.15 and III.16 are denied.

7. Paragraphs IV.17, IV.18, IV.19 and IV.20 are admitted.

8. Paragraph IV.21 and all sub-paragraphs are admitted.

9. Paragraph IV.22 is admitted.

10. That portion of Paragraph IV.23 which alleges that the plaintiff was denied a pardon on October 3, 1977, is admitted. The remainder of said paragraph is denied.

11. Paragraphs IV.24 and IV.25 are admitted.

12. Paragraph IV.26 is admitted except that the dated May 3, 1976, should be April 5, 1976.

13. Paragraphs V.27 through and including V.30 are admitted.

14. Paragraph V.31 and all sub-paragraphs thereof are admitted except that portion of V.31(b) which alleges that Czaja has participated in the furlough program from 1970. In fact, Czaja has participated in such program since 1972.

15. Paragraph V.32 is admitted.

16. That portion of Paragraph V.33 which alleges that Czaja was denied a pardon on May 2, 1977, is admitted. The remainder of said paragraph is denied.

17. Paragraph V.34 is admitted.

18. Paragraph V.35 is denied for the reason that said letter speaks for itself.

19. Paragraph V.36 is admitted to the extent that it alleges that the plaintiff has *twice* been denied a pardon. The remainder of said paragraph is denied.

20. Paragraph VI.37 is admitted.

21. Paragraph VI.38 is admitted except for the claim that the plaintiff was convicted of First Degree Murder. He, in fact, was convicted of Second Degree Murder.

22. Paragraphs VI.39 and VI.40 are admitted.

23. Paragraph VI.41 and all sub-paragraphs are admitted.

24. Paragraph VI.42 is admitted.

25. That portion of Paragraph VI.43 which alleges that Shelton was denied a pardon on October 3, 1977, is admitted. The remainder of said paragraph is denied.

26. Paragraph VI.44 is admitted.

27. Paragraph VI.45 is denied for the reason that said letter speaks for itself.

28. Paragraph VI.46 is denied except that it is admitted that plaintiff Shelton has appeared before the Board of Pardons and denied a pardon on seven occasions.

29. Paragraph VII.47 and all sub-paragraphs are denied.

30. Paragraph VII.48 is denied.

DEFENDANTS

Board of Pardons, et al

CARL R. AJELLO
Attorney General

By STEPHEN J. O'NEILL
Assistant Attorney General
340 Capitol Avenue
Hartford, Connecticut

Service certified pursuant to
Rule 5(b), F.R.C.P. this 1st
day of May, 1978.

STEPHEN J. O'NEILL
Assistant Attorney General

BERNARD GATES, called as a witness, being first duly sworn, was examined, and testified as follows:

BY THE COURT:

Q You're Chairman of the Board of Pardons?

A Board of Parole.

Q Board of Parole?

A Yes, your Honor.

MR. O'NEILL: For what it's worth, I would just like to note briefly for the record that I'm at sort of a disadvantage. I am representing Mr. Gates in a number of cases, and have represented him in a number of cases, and also represent the Board of Parole.

I just think the record ought to note that.

THE COURT: I would think you would have an extra advantage, from what you said. You not only know everything about Mr. Gates —

MR. O'NEILL: I'll take all the advantages I can get.

BY THE COURT:

Q Chairman of the Board of Parole. How long have you been the Chairman?

A Nine years.

Q Nine years. All right.

Now, what we are concerned about here is whether you know what percentage of the cases of prisoners under life sentence over any period of time that you can tell us about have had their sentences commuted in order to make them eligible for earlier parole considerations.

A Your Honor, I can't give you definite statistics. I don't have the staff to go through thousands of files.

I have been associated, however, with the Pardons Board, have known something concerning its work, for thirty-five years, almost since I've been in the corrections system.

My judgment is that no more than 10 or 15 percent of lifers serve the whole twenty years. The bulk of the commutations over the past years, until recently at least — and I can't speak of it recently — but the bulk of the commutations over past years appeared to come between 14 and 17 years.

Q My question is not when, but how many receive some commutation so as to make them eligible for parole consideration.

A I cannot testify to that. The only thing I can say, in the nine years I've been Chairman of this Board there have only been, I believe, three lifers appear before the Board for parole consideration who had served the total twenty years. I don't know who has the statistics.

Q Only three during how long a period?

A During the nine years. I believe there's only three that had completed a total of twenty years.

There used to be — Your Honor, for a number of years there were a great many cases commuted somewhere between

14 and 17 years, and that type of thing.

Q Well, I'm not talking about just when they got to it.

A Yes.

Q But they got to it at some point.

A At some point.

Q In many of the cases?

A Many of them.

Q And when you say twenty years, is that the statutory minumum for a lifer?

A That was, until October of 1975, on all cases.

Q So there was nothing in the way of a modification of sentence in order to permit earlier parole consideration in three cases of lifers over a period of nine years?

A I believe that is correct. That's an estimate.

Q I don't know how many lifers there were sentenced over that period. You don't either, I guess?

A I don't. In recent years I haven't had the time. I remember ten years ago or so when there were ninety lifers in the institution.

Q When there were ninety?

A Yes. But I could not testify as to what it is now at all.

Q All right. So certainly over 75 percent of lifers have

had some action in their favor which made them eligible for parole?

A I would judge that to be correct, your Honor.

Q Yes, 75 percent, anyway. That's an estimate.

Now, are you on the Pardons Board?

A No, your Honor, I am not. It's a completely separate board.

Q Now, when such a lifer comes before you, and on the Pardons Board, are they then automatically granted a parole because the Pardons Board has said this fellow is eligible for parole?

A No one is automatically granted parole, your Honor. It is the Board of Parole's responsibility to decide whether a person would be paroled. And I do believe that the Board of Parole members place some credence in the fact that the Board of Pardons commuted this man to a shorter term and, consequently, believe that he was eligible for serious parole consideration.

We have not always paroled them, however.

Q I see.

A I can remember at least of two cases in recent years where we did not parole for, in one case, more than three years; in another case, for approximately two years.

But in the vast majority of the cases, I would say 90 percent of the cases at least, a commutation by the Pardons Board results in parole by the Parole Board.

Q Well, you don't know to what extent the Pardons Board — well, all right. I guess not.

Ninety percent are given parole. How about the other prisoners who don't come to you that way - how many of them are given parole?

A Well, in that particular institution, and lifers are all originally at Somers and I think are almost always there when they appear before the Board of Pardons, in that particular institution our parole rate is approximately 55 percent. I can testify to the fact that the percentage of lifers who are paroled is higher than other offenses.

Q The parole rate is 55 percent?

A At the present time.

Q Including lifers?

A Including lifers. Including all cases at the Somers institution is averaging about 55 percent.

Your Honor, the figure that you stated a while ago concerning — or someone stated concerning percentage of paroles, and I think has been stated on this stand by me in previous cases, is the whole Department of Corrections; ten different institutions.

Q I see.

A This type of offender is sentenced to the Somers institution and in that institution, where the more serious offenders are confined, the average parole rate at the present time is about 55 percent.

Q Including the lifers?

A Including the lifers.

THE COURT: Is there anything further you think we can get of usefulness to us?

MR. HANLY: I just had two more questions.

THE COURT: Sure.

DIRECT EXAMINATION
BY MR. HANLY:

Q In approximately how many cases per year is parole denied or parole revoked? Just a general approximate figure.

THE COURT: Well, you can't say both.

MR. HANLY: Okay.

THE COURT: "Denied". Well, he says 55 percent, they get it.

MR. HANLY: Your Honor, I was interested in the number of cases, to compare the number of cases in which the Parole Board per year grants a statement of reasons versus the Pardons Board, in order to establish something about the burden that would be on the Pardons Board.

THE COURT: Okay.

A In granting hearings we deny approximately 300 men a year, in which we give oral reasons at the time of the decision and written reasons within ten days afterwards.

On revocations, we are averaging about 250 to 260 revo-

cations a year. We provide oral reasons to the parole violator after the hearing and in the presence of his attorney. We do not provide written reasons, except by written request.

MR. HANLY: That's all I have, your Honor.

THE COURT: All right.

MR. O'NEILL: I have just a couple of questions, your Honor.

THE COURT: Denial of parole then is always accompanied by a statement of reasons, right?

THE WITNESS: Yes sir.

THE COURT: Orally, at the end of the hearing?

THE WITNESS: Yes, your Honor.

THE COURT: And in writing ten days later?

THE WITNESS: Yes, that's correct.

THE COURT: All right.

CROSS-EXAMINATION
BY MR. O'NEILL:

Q Mr. Gates, on these lifers whose minimum term has been reduced by the Board of Pardons and are ultimately paroled by the Board of Parole, I think you said that that percentage is something like 90 percent?

A That would be my judgment.

Q Would you have an idea as to how many years those

lifers would have served on those sentences?

THE COURT: What?

Q How many years would those lifers have served on those sentences prior to being paroled by the Board of Parole?

A My estimate would be that the vast majority of commutations over the years has been between 14 and 17 years.

Q And this parole rate at Somers of 55 percent, you are talking about each individual parole release hearing, take it?

A Well, the statistic I was endeavoring to give was at the present time fifty-five — yes, I understand what you mean. At the present time fifty-five — No. During the year, 55 percent of those appearing before the Board at the Somers institution during the year are paroled.

Q So this 55 percent is a yearly percentage?

A Yes, that is correct.

Q Of the parole release hearings at Somers?

A Yes.

MR. O'NEILL: I have no other questions, your Honor.

BY THE COURT:

Q Now, when you get a commuted lifer before you for parole consideration, does anything come down to you in his file to show on what basis the Pardons Board acted, other than the fact that there's a certificate: "Commuted"?

A No, your Honor.

Q That's all you get?

A We receive the minutes of each Pardons Board meeting, but it just merely states that the person's sentence is commuted to whatever time it was commuted to.

Q That's all you get?

A That's all. Except in an unusual situation where there's a medical situation, or where there's one case the year before last the Pardons Board commuted with the stipulation that the Parole Board parole only to a mental hospital if he would be kept there the rest of his life.

Of course, that is impossible. The Pardons Board doesn't have the authority to do that. Neither can anyone judge a person to be there —

Q Well, you can't blame them for being innovative, or trying to be.

A But normally it just says the time is commuted to such and such a time.

Q Do you get anything from them: when you get these minutes, is it the minutes of their whole session?

A The whole session.

Q Or just of this particular prisoner?

A No. The minutes are very short and it gives, like most minutes, those who are present, who sat on the cases, and has only to do with those who were granted commutation. There's nothing in it about any cases that are heard that are not granted.

Q So you don't know why they were not granted in a case?

A No.

THE COURT: And neither do we, I guess.

Is there anybody here who can tell us what happens in those cases?

MR. O'NEILL: Well, on that point, your Honor —

THE COURT: Do we need Mr. Gates any further?

MR. HANLY: Nothing further, your Honor.

THE COURT: Just one point to clear up:

BY THE COURT:

Q I think you said that 90 percent of those who come before you with a commutation in hand are granted parole.

A At least 90 percent.

Q On their first appearance?

A That is correct.

Q And the others may be a delay of two or three years for some reason, or are some of those denied parole - the other ten percent?

A They are denied parole. All of them — I think I'm correct to say all of them have been paroled to some time.

Q At some time.

A And I can remember our denying one man for three or four years. But I think that's the longest time.

Normally we parole, your Honor — The cases that were granted commutation in October we will be hearing in December.

Q Right.

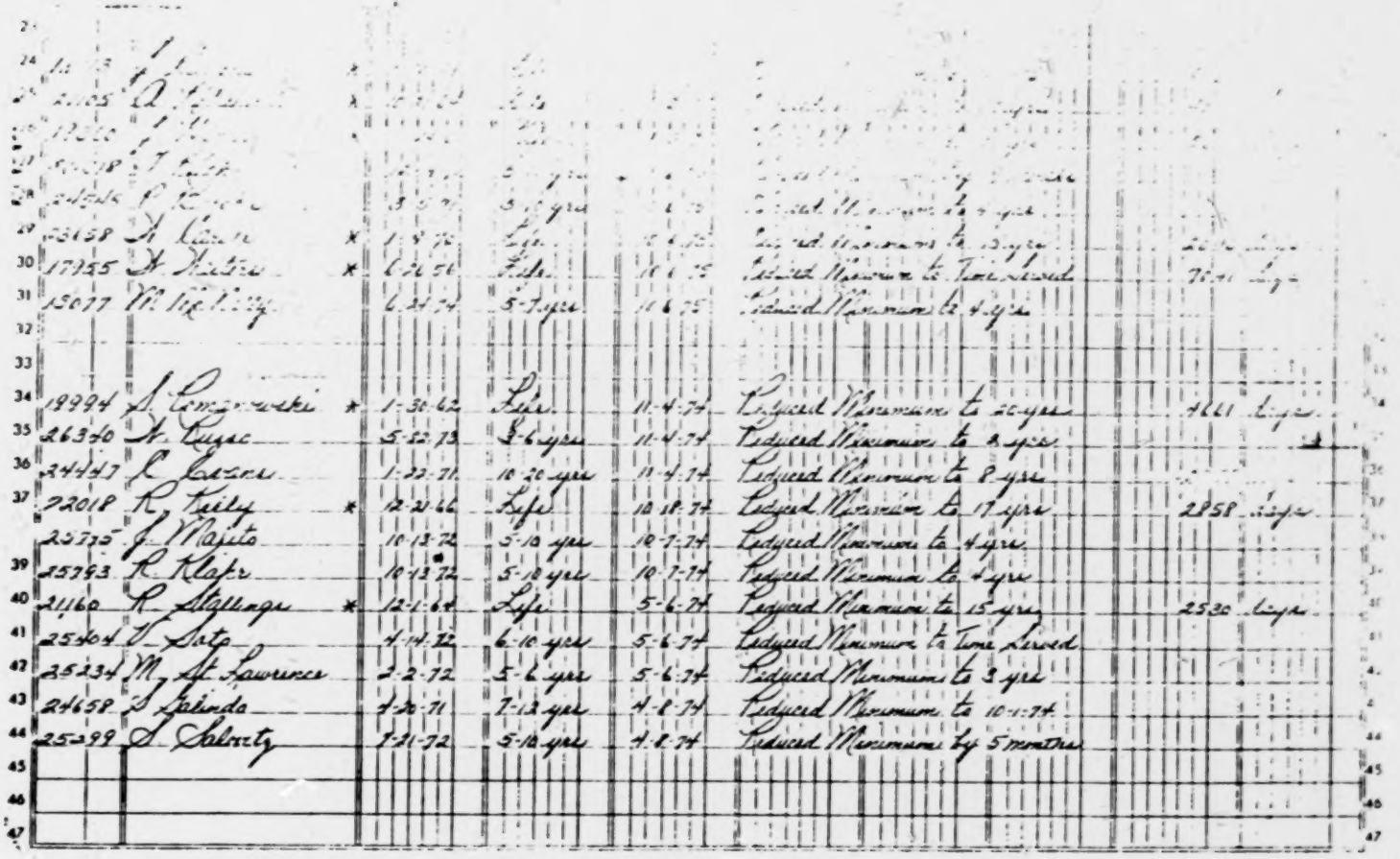
A And they probably will be paroled within sixty days of that time, if they're granted parole.

THE COURT: All right. Thank you, Mr. Gates.

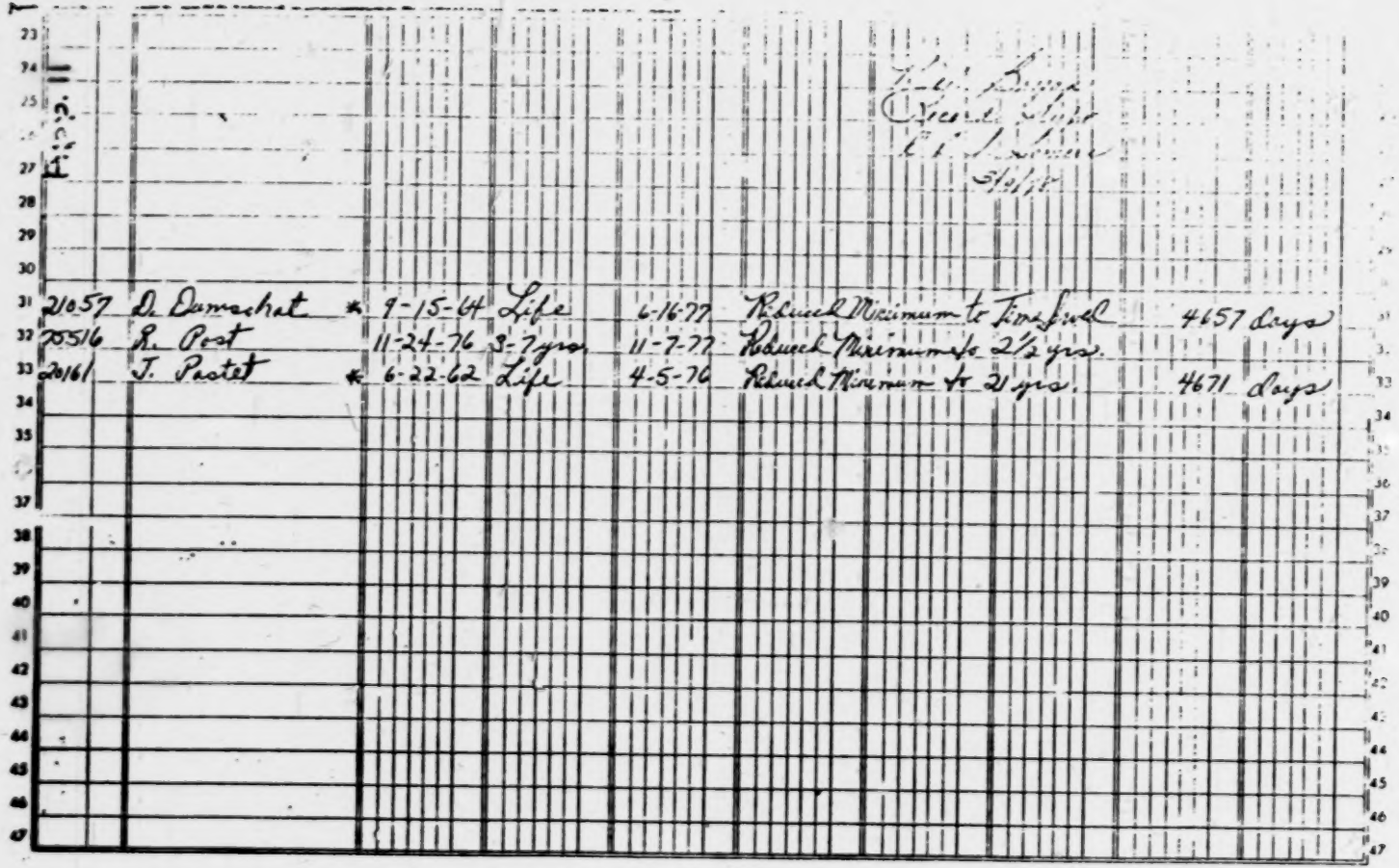
(witness excused)

* * * * * *

#	Name	1 Date of Sentence	2 Sentence	3 Action to be Taken	4	5 Board Action	6	7	8 Time Served
1	[illegible] C. Cesar	9-26-73	10-Life	11-7-77	Reduced	Maximum	to 5 yrs		
2	20470 C. Fuentes	5-1-72	16 2/3 yrs	11-7-77	Reduced	Maximum	to 9 1/2 yrs		
3	24257 A. Cruz	9-17-74	2-5 yrs	10-3-77	Reduced	Maximum	to Time Served		
4	25041 L. Cruz	7-14-76	5 yrs	10-3-77	Reduced	Sent. to 4-5	Entire rate		
5	00460 C. Roberts *	12-6-48	Life	5-2-77	Reduced	Maximum	to 18 yrs	30.69	days
6	67345 F. Dixon	1-6-76	5-15 yrs	5-2-77	Reduced	Maximum	to 2 1/2 yrs		
7	01165 J. Hardin *	2-20-61	Life	5-2-77	Reduced	Maximum	to 20 yrs	5907	days
8	26496 E. Hardin	9-26-73	10-Life	5-2-77	Reduced	Maximum	to 7 yrs		
9	19963 D. Little *	1-3-62	Life	5-2-77	Reduced	Maximum	to 20 yrs	5598	days
10	63254 J. Tolle	11-7-75	4-8 yrs	4-4-77	Reduced	Maximum	to 3 yrs		
11	21882 W. Chapman *	1-27-66	Life	4-4-77	Reduced	Maximum	to 20 yrs	3905	days
12	46540 J. Davis	7-19-74	7 1/2-10 yrs	4-4-77	Reduced	Maximum	to 5 yrs		
13	25634 R. Knight *	11-30-71	Life	4-4-77	Reduced	Maximum	to 20 yrs	1958	days
14	[illegible]								
15									
16	23614 S. Lagos	7-15-76	2-5 yrs	11-1-76	Reduced	Maximum	to Time Served		
17	19630 D. Mabery *	3-10-61	Life	10-14-76	Reduced	Maximum	to 20 yrs	5701	days
18	23634 J. Orr *	12-15-69	Life	10-14-76	Reduced	Maximum	to 20 yrs	2495	days
19	21860 L. Esquivel *	11-20-71	Life	10-14-76	Reduced	Maximum	to 20 yrs	1790	days
20	22927 K. Easton	6-1-73	16 2/3 yrs	4-5-76	Reduced	Maximum	to 14 yrs		
21	[redacted]								
22									



24									
25	21105	D.							
26	12[illegible]								
27	[illegible]								
28	[illegible]				3 yrs				
29	23158	H.			Life		Reduced Minimum to [illegible] yrs		
30	17955	H.		6-26-56	Life	10-6-75	Reduced Minimum to Time Served	7841	Life
31	15077	W.		6-24-74	5-7 yrs	10-6-75	Reduced Minimum to 4 yrs		
32									
33									
34	19994	S.		1-30-62	Life	11-4-74	Reduced Minimum to 20 yrs	4611	Life
35	26340	R.		5-22-73	3-6 yrs	11-4-74	Reduced Minimum to 2 yrs		
36	24443	L.		1-22-71	10-20 yrs	11-4-74	Reduced Minimum to 8 yrs		
37	22018	R.		12-21-66	Life	10-18-74	Reduced Minimum to 17 yrs	2858	Life
38	25735	J.		10-13-72	5-10 yrs	10-7-74	Reduced Minimum to 4 yrs		
39	25793	R.		10-13-72	5-10 yrs	10-7-74	Reduced Minimum to 4 yrs		
40	21160	R.		12-1-64	Life	5-6-74	Reduced Minimum to 15 yrs	2530	Life
41	25404	T.		4-14-72	6-10 yrs	5-6-74	Reduced Minimum to Time Served		
42	25234	M.		2-2-72	5-6 yrs	5-6-74	Reduced Minimum to 3 yrs		
43	24658	J.		4-20-71	7-13 yrs	4-8-74	Reduced Minimum to 10-1-74		
44	25199	J.		7-21-72	5-10 yrs	4-8-74	Reduced Minimum by 5 months		
45									
46									
47									



21057	D. Damschat	*	9-15-64	Life	6-16-77	Reduced Minimum to Time Served	4657 days
20516	R. Post		11-24-76	3-7 yrs.	11-7-77	Reduced Minimum to 2½ yrs.	
20161	J. Pastet	*	6-22-62	Life	4-5-76	Reduced Minimum to 21 yrs.	4671 days

Parole Board Action

Page 2

	#	Name		1 Date of Sentence	2 Sentence	3 Earliest Poss. Rel. Date	4 5 6 Parole Board Action	7 8 Time Served	
1	22225	R Labriola	*	1-19-65	Life	11-5-73	Reduced Minimum to 10/1/74	2212	days
2	24261	L Lasso		11-30-65	17-40 yrs	10-15-73	Reduced Minimum to 15 yrs		
3	21159	J Testi	*	11-30-64	Life	10-15-73	Reduced Minimum to 15 yrs	3971	days
4	24836	D Lewis	*	6-23-71	Life	10-15-73	Reduced Minimum to 5 yrs	845	days
5	25161	F Stopka		6-18-71	7-14 yrs	10-1-73	Reduced Minimum to 10/1/74		
6	24621	V Aponte		5-9-72	8-16 yrs	9-3-73	Reduced Minimum by 1 yrs		
7	24996	L Savage		10-15-71	5-15 yrs	9-3-73	Reduced Minimum by 2½ yrs		
8	20865	C Farrar	*	3-20-64	Life	9-9-73	Reduced Minimum to 2nd/74	3370	days
9	25261	A Lari		7-12-72	2-10 yrs	9-9-73	Reduced Minimum to 1 yrs		
10	21569	J Zappone		11-30-65	17-45 yrs	9-9-73	Reduced Minimum to 7/1/75		
11	25184	D Pearson		6-30-70	5-15 yrs	5-7-73	Reduced Minimum to 2 yrs		
12									
13									
14	19318	J Mauro	*	4-26-60	Life	10-2-72	Reduced Minimum to Time Served	4541	days
15	23553	A Hopkins		4-27-70	2-12 yrs	10-2-72	Reduced Minimum to Time Served		
16	23667	W Buscemazzi		1-9-70	5-7 yrs	10-2-72	Reduced Minimum to Time Served		
17	22966	D Calarace		12-20-68	2-14 yrs	10-2-72	Reduced Minimum to Time Served		
18	22420	O Nemes		5-27-69	3-5 yrs	10-2-72	Reduced Minimum to Time Served		
19	23062	C Malave		1-27-69	7-15 yrs	10-2-72	Reduced Minimum to Time Served		
20	18985	D Crawford	*	6-1-62	Life	10-2-72	Reduced Minimum to Time Served	3700	days
21									
22									

PAUL McQUILLAN, called as a witness, being first duly sworn, was examined, and testified as follows:

* * * * * *

DIRECT EXAMINATION
BY MR. O'NEILL:

Q Mr. McQuillan, I guess we've established that you are the Chairman of the Board of Pardons.

A Yes, I am.

Q And how long have you been the Chairman?

A I believe it's about a year.

Q And did I forward to you the transcripts in the Corrona and Dumschat cases tried before this Court.

A Yes, you did.

Q Involving the same issue involved in these cases?

A That is correct.

Q And at my request did you study those transcripts?

A I have read them.

Q Those transcripts include quite a bit of testimony from Mr. Loveland, who was then the Chairman of the Board of Pardons, outlining the procedures applicable before the Board of Pardons, do they not?

A They do.

Q And those procedures are the same now as they were when he was testifying?

A They're basically the same, yes.

Q And the issue in this case, as it was in the cases previously tried before this Court, is whether or not, as a matter of due process, a person who is denied a pardon is entitled to a statement of reasons for that denial.

A That's right.

Q Do you agree that that was the issue in Corrona and Dumschat?

A Right.

Q And it is true that as of today the Board of Pardons does not give a reason as to why a pardon is denied?

A We do not.

Q All right. Why?

A I think it's basically what I believe the members of the Board understand to be what a pardon is; and that is, as I interpret it, an act of mercy, an act of forgiveness that is shown to a person who asks for that. It's a very extraordinary type of remedy.

Some of the people that come before us, and I have not looked at the cases of the gentlemen named on the petition but I think I can recall two of them —

MR. O'NEILL: Well, if I may interrupt just for a second, your honor.

Counsel and I have agreed that we will, by way of stipulation, submit to the Court the file that was before the Board of Pardons when these three named, specifically named plaintiffs were last denied a pardon. That will be coming in within a few days.

MR. HANLEY: We have agreed to that, your honor.

THE COURT: Have you seen it?

MR. HANLEY: The file? No, we haven't yet seen it.

THE COURT:It is submitted to me in camera?

MR. O'NEILL: No, there's nothing secretive about it.

THE COURT: What?

MR. O'NEILL: There's nothing secretive about it. But it will be submitted to you by way of stipulation within a few days.

THE COURT: When it is, what am I supposed to do with it? Weigh it, or what?

MR. O'NEILL: Just to show what file the Board of Pardons had before it when it denied these gentlemen the pardon.

THE COURT: So what? So I see this is the file they had. Am I supposed to examine it?

MR. O'NEILL: Well, not sitting as a super pardons board, no.

THE COURT: Then for what?

MR. O'NEILL: To show what was before the Board of Pardons when they denied a pardon.

I think you ought to know what was before them when they considered this request for pardon.

THE COURT: Does it matter what was before them in deciding whether or not they ought to give a reason for denying the pardon?

I mean it may show a good reason for denying it, but —

MR. O'NEILL: I'm sure it does.

THE COURT: —does it show a good reason for not expressing a reason?

MR. O'NEILL: Well, that's what you will have to decide after we submit this to you.

THE COURT: All right.

So you are going to submit those to me; those three files.

MR. O'NEILL: Yes, your honor.

THE COURT: What else?

MR. O'NEILL: I interrupted the witness.

THE WITNESS: Well, I was being asked —

BY THE COURT:

Q Well, you said you regard it as an act of mercy and, therefore, appeals to factors that don't lend themselves on the historical basis of the law to reasons. Is that right?

A That's true, your honor. I think many people, including lawyers who come before us, I feel confuse our board with the Parole Board or some other system whereby you earn credits. If you have done a month in prison, have behaved yourself, you've earned credits, say, for five days.

There is no credit system that I know of by which you earn a pardon. There are no certain acts you perform.

I have had people come before us, your honor, I've been on the board now five years, who have been exemplary prisoners. They're models. They do everything right. They've never been in trouble. They're in AA, they go to church every day; all the things that you would expect a person to do to rehabilitate himself. And they're still denied a pardon.

Q Why? Now, take a case like that. Why would you deny him a pardon?

A All right. First of all, we have to consider, your honor, the enormity of the crime that was originally committed and the effect that that had on society and the effect that it has on the overall criminal justice system. I think that's —

Q Well, if you consider that and that's the reason for denying it, why can't you say so?

Why can't you say the seriousness of the offense was so marked that no pardon ought to be granted?

A I think in individual cases, your honor, there can consideration; it might not be too difficult to say that.

But may I — you've asked me for an example, and these are public records and our hearings are public. There were two young men recently that were out on furlough down at Cheshire. They were considered model prisoners. They were allowed to walk the streets every day. And they were out one day and they were found to have weapons in their rooms. Then they'd end up where they went out and raped someone.

They came before us and the people that had marched in—

Q They came what?

A When they came before us, I would say I've seen one of them there maybe six or seven times since I've been on the Board, and the people, maybe as many as 30 to 40 people, came to speak in their behalf from all sorts of factors of our community. And they cannot understand why we won't grant that pardon.

Well, one of them, when I looked at the crime, he walked into his house one night with a shotgun and blew his father's head off, raped his sister and held off the police. He's been in jail now for eight years for that.

I just felt that the type of crime he committed was such that eight years was not enough and I did not see in him, from the record, that this man really had the type of appreciation for what he did.

Q All right. That sounds like a good reason.

But the question here is why shouldn't you say so and tell him so. Why shouldn't that appear on the record?

A My personal feeling, your honor, is that if we were working under some type of merit system and credit system where I could say to him, "you go out now and behave yourself for six months, or whatever, and we'll go give you a pardon, don't get arguing with any of the guards", or maybe some other type of rehabilitation. All right.

But if I may compare it, and maybe I'm being unfair, when your honor is giving a sentence and you get a pre-sentence report before you and that report may indicate, by all the things we know, that that person should go to jail, or it may indicate that they should not; but when they appear before you, their demeanor, the way they conduct themselves, you may decide to go a different way. And there's nothing that requires, that I know of, that you give any reason whatsoever for why you make that final decision. The decision is up to you.

I think that we, as members of the Board, feel that way; that we —

Q Well, there is a proposal that even on sentencing, there is a proposed amendment to the rules that would require the Judge to express his reasons for imposing a particular sentence.

MR. O'NEILL: Yes. But would that be as a matter of constitutional law, or just a rule change.

THE COURT: Well, I say there is a proposal.

MR. O'NEILL: We're litigating a constitutional issue here.

THE COURT: All right. I understand.

A If I may. One of the men I believe that's down here today, your honor, I haven't looked in the records and I didn't know what the names were really until this morning, but as I recall the particular incident he was involved in, and he's a very

humble man, he comes before us with very little education, with probably as many as 25 or 30 crimes over a long period of time when he was a younger man.

The incident that he was involved with, apparently he had been with another woman, the woman's husband found out about it, and he came over and punched holes into the four tires of his car and flattened them with an ice pick.

He called for his wife. His wife came. He had a gun in his car. He drove her to the man's house. He knocked on the door and he says, "you just ruined my four tires." The guy says, "well, you know, you've been out with my wife all day".

"Yeah, but you ruined my four tires". And he shot him dead.

And I think to today he doesn't appreciate, perhaps, the value between human life and the material things, and it's based on no educational background, a sharecropper coming off a farm, and I don't think that he had that evaluation.

I think it would be almost impossible to explain to this man why he was denied that pardon.

Q (By the Court) Well, it doesn't say that your reasons have to be explainable to the man, as long as they are given. I don't understand that any Court has ever required that the reasons be fully appreciated by the rejected applicant.

The purpose of having reasons expressed on the record is just to establish that there is a record basis which would support those reasons that it's not arbitrary and capricious. That is, that you don't say anything, you might be turning a fellow down because he shuffles in when he walks in, or because he's got red hair, or wears a beard. There might be all kinds of impermissible reasons, but unless you express one that the

record can support, there's a question as to whether there has been due process provided.

A Well, your honor, I do not concur with that, because I feel —

Q I know.

A We don't always agree.

Q It's a moot point. The Supreme Court has just decided that they improvidently granted certiorari in a case that raised the question.

A I feel that we would be starting here with developing some sort of a score card for prisoners. That the people that I've seen that are making this type of petition and who have made complaint, individual lawyers who have come to me and say, "Gee, why didn't you let this person out, what does he have to do, where do we go with this sort of thing"; what they're looking for is almost sort of a score sheet to earn credits to get a pardon.

I don't believe that they can do before the Parole Board, that they did when they came to pre-sentence, that they did when they were sentenced. This is something entirely different, since clemency is going to be given to them.

If they start looking for score cards to keep, to earn — I'm using that terminology — some report card, or whatever it may be that would earn them credit to get out, I don't think that that's the way it works.

We have changed a little bit, your honor, in the last year. I think the record would indicate that we have, in fact, given pardons to inmates without going to the Parole Board; that we have said that they should be out Wednesday afternoon, or Friday.

We don't have them go out that same day only because of administrative procedures and the trauma of the person going out onto the street. We allow the institution to give them that opportunity.

But I think that I was asked my philosophy, and I personally feel that the Board of Pardons, if it's going to have any real meaning, should start giving pardons where they are warranted.

Q (By the Court) Do you realize how you're upsetting the whole system?

A It won't be the first time, your honor.

Q I don't say that entirely in a facetious way.

A I know you don't.

Q Because one of the big problems with inmates, as you now know if you've been on this Board for a year, is the discontent and the problems that that discontent generates among prisoners which arises from disparity in treatment. And the disparity in sentence is one of those things, and we try to avoid that at our end up here.

Also, the disparity in granting parole. Every time a fellow gets parole, the fellow that doesn't get it says, you know, why didn't I get it; and this becomes a matter, I'm sure of discussion and conversation throughout the prison.

And now when you go ahead and say you don't even need to go to the Parole Board, you came to us and we set you out just like that, everybody who comes before you is going to say, now, wait a minute, why are you sending us before the Parole Board now, when you do send some.

I don't know. I don't mean to deter you from what you are doing. All I want to point out is that having decided to do that, you have injected another possible source of discontent among the remaining prisoners.

A I think, your honor, we are well aware that because it's —

Q Because the Parole Board went after you themselves and said, "What are you doing"?

A No. These are not people, your honor, that have been in here for a year or two. They have been people who have been in here for perhaps over 15 years. And it might be that it is a compelling health reason.

It's really an act of mercy. In other words, that they've been in there so long and they maybe have six months to a year, and they're not going to be able to do anything but die, and give them the opportunity to be with their family. So we have done that.

But we are acutely aware of the fact that within that prison institution every bit of our conduct is closely watched, and if there is an indication of any unfairness it causes a lot of difficulty; and the warden is, of course, very concerned about that sort of thing.

His wishes — he has never discussed a case with us, and is not asked. But we know that if we should do something with that, we could cause a great deal of dissension among the people.

Q All right. As I say, it's really not my business to butt in there. But I was a little curious as to the kind of reasoning on the

part of the Board when they can say to themselves: "Well, we're going to give this fellow pardon complete, starting this afternoon": and then say to the next fellow: "Well, you get nothing and we're not even going to tell you why, what our reason is".

A Well, your honor, I think we do have awareness of the fact that a person that comes before us has gone through our judicial system, has had either a trial or a plea, a pre-sentence, appeal, and so forth.

So that we do not want to take away the prerogatives of the Court. The Court has said: 20 years. Now, if we just start giving out pardons and taking that away, I think we'll be very —

Q I don't say you can't be tough and that you should give out pardons. All we're concerned with is, when you don't, why can't you put down a line or two and say why. "We are not doing it here, there is a terrible crime, and the seriousness of the offense would be deprecated if you were given a pardon".

That seems to be an adequate basis for guideline discrimination in the Federal parole system, and it's been upheld when they just say: It would deprecate the seriousness of the offense to let this fellow out until after he has served at least 48 months, or 60 months, or whatever the case may be: that it would deprecate the seriousness of the offense, and that would be enough to justify a larger period before parole consideration.

So I don't see why it's so tough to do that.

A It might not be a question of toughness, your honor, as far as difficulty in carrying out administratively.

Q All right. Now, we've got another problem. Administrative difficulty. All right.

A I would say, your honor, that in answer to your question to me just now, that I don't know that we would be helping an individual if we had a patented answer that: You have just committed such an awful crime that we cannot consider you at this time.

Is that going to give him any more incentive or any more way of preparing himself to get out? We're not helping him anyway, and I think we can automatically do this and almost have here a routine, but I don't really think that's being fair to that prisoner.

Q Well, now if that's the reason — you know, if you don't tell him anything at all, you're not being fair, you're not being more fair than if you tell him, well, this was just that kind of an offense, it was just that bad, we're not going to give you a pardon.

Now, as I say, whether he's willing to accept that is not the point. The only thing is he knows you're not doing it because his name is Gisolowicz, or because he's black, or because he's black and was married to a white woman, or something like that.

He knows then this is because of what you did, it was so bad. So at least he knows that what you said is that it's not because of some quirk of your own that would be an impermissible basis; but it's a reason. And we may not agree that you're right, but at least he can't say that it's arbitrary and capricious.

Now, have you given consideration - well, I guess it doesn't really matter from your standpoint. That your concept of dispensing mercy is a little weak here as far as support goes.

It's true that you can pardon completely, and in that sense you are dispensing mercy. But until you started giving them a pardon, all that the Pardons Board did was to make them

available for parole consideration. They just said now in this case we will let the Parole Board decide whether you ought to get out. That was the function of the Board of Pardons. It was just sort of a super branch of the Parole Board dealing with those cases which would not automatically be eligible for parole consideration under the law.

All you do is make them available for parole consideration, and then the next step is whether they should go out on parole, and on what conditions.

A pardon carries with it a whole lot more freedom and a whole greater restoration of rights by far than admission to parole.

A It does.

I think as I understand it, as it has developed over the years, while the Board of Pardons certainly had the power to just pardon them —

Q Yes, you have that.

A We ought to call a meeting this morning, and somebody is pardoned, and that's it.

However, I believe that the Board has felt that it did not have the staff and facilities to go into the in depth preparation for a person to go out into the street. And that's where the Parole Board can be of assistance.

Q But the Parole Board does that.

A Yes, it does.

Q Then I don't know why the Pardons Board doesn't do what I have construed their function to be is merely to make a

prisoner who is not eligible for parole consideration, pardon him to the extent that he becomes eligible for parole consideration.

A And we do do that.

Q Well, that has been done and that's the way it was done.

A And we still do it.

Q And you still do it.

A Yes.

Q Well, sometimes you take the shortcut and say: Right away we're going to pardon you, it's only six months and —

A Your honor —

Q I don't quarrel with it.

A I don't want you to get the impression that this is done on a mass basis. It's not. It's a very rare occasion when it's done.

Q Sure.

A But it had been done.

Q All right. I'm talking too much here about administrative difficulty.

Now, what is the administrative difficulty you're talking about? Do I understand it's to express a reason that it's an administrative difficulty? To write that on the record, or to actually stamp a slip and sign it?

A First of all —

MR. O'NEILL: Are you asking him?

THE COURT: Yes. this is what he said. Mr. McQuillan said there's administrative difficulties in giving reasons for the denial of an applicant for a pardon.

A I'm not so sure that I said that, your honor.

I started to talk about administrative problems, and I don't know if I said — I said it would not be difficult to just take a piece of paper and sign on it: You've done a bad thing, you have to stay around for a while.

I do think if we're going to be fair to these people that our Board, before we did that, on each person, that we would have to sit down among ourselves and discuss and come to a conclusion to give a written statement as to why that pardon was denied.

And as you know, with 40 or 50 or 60 of these at a sitting, it would be a considerable increase, I would think, in the clerical work and also —

Q Well, "considerable increase". Now, you read all these files.

A Yes sir.

Q And your fellow board members, I assume, do.

A I find that in our discussions it is obvious they have.

Q All right. So you discuss it and one says: Deny this fellow; his crime was so serious that it would deprecate the seriousness of the offense if he were to be given a pardon.

A Yes.

Q Now, that takes a part of a minute. What is the administrative difficulty that follows from that quick disposition?

A I don't see any great difficulty.

Q Administrative difficulty?

A No. They're going to be given an answer as to whether they were or were not granted a pardon, anyhow.

Q Yes. You say: No, the crime was too serious. The nature of the crime was such that it would deprecate the seriousness of the offense.

A But I don't think it would be fair, your honor, for you to have the impression that that's the only reason we're going to deny that pardon. It may be that while the crime was serious and the person has been in there maybe a sufficient amount of time, that he should be given consideration —

Q And you're still not going to give him a pardon.

A And you've got a four page psychiatric report and the last line says given the same circumstances, the same stress, we cannot assure you that he will not commit the same crime.

I think it's the same consideration that courts have in releasing someone early. Then they go out on the street and commit a terrible crime again. There is that hesitation that we would certainly have if we feel that that person, even though he seems to have been rehabilitated within the prison structure —

Q All right. Let's talk about that situation.

Here is a situation where a decision may be called for as to whether he would be a danger to society if he were released. Right?

A Yes sir.

Q That's the problem you're thinking of.

A That can be a problem, yes.

Q Now, that's a problem that the Parole Board has to consider too, does it not?

A Yes, it does.

Q And if you then say this is a problem, but we'll let the Parole Board decide it, you are deciding their problem in that case, are you not?

A You mean if we reduce it to enough time so they can go before the Parole Board

Q Right.

A I would say that we do expect that if a case goes before the Parole Board, it is going to do its responsibility also; and not just because we gave a pardon to reduce it means that that person should go out on the street. It means that he should be given consideration at that time for parole.

Q That's all.

A Now, I think the case that your honor had before you, and decided, and that became moot, we had heard that gentlemen at a session and we were giving very serious consideration to give him a pardon. We thought he was at that point. But we

were very concerned about the psychiatric evaluation we had. And we wanted some assurances in that regard before we granted it.

While you're deciding it, or it was going up, that information —

MR. O'NEILL: It was the same day.

A — that information came back to us and we were satisfied that, yes, he should be pardoned now, and we did grant it.

A year before that, based upon the reports that I had seen, I would not have considered that man for a pardon. But I was then satisfied — had he rehabilitated himself, educated — in fact, he's married now. On one of his furloughs he got married. The man had done almost a normal life. The point was should we keep this man here, are we becoming cruel; he's out on the street every day, anyhow.

But we also had to consider that he had committed a very serious crime.

Q I understand.

A So we decided that if we could have some assurances from what we consider to be the experts that this man is not going to be a danger to society, that he would be let out, and we did.

Q Well, suppose you say that. The psychiatric reports we have indicate the risk of releasing him to society is too great, the danger to society is too great to risk his release.

A Well, I don't want to — when I call witnesses, your honor, I think that —

Q No.

A You know, I'm an attorney and I practice, and sometimes as a witness it's difficult because you're second guessing those who are questioning you because you sometimes know what the inevitable is.

But what I'm really saying is that perhaps the theory of a pardon, and I hope you don't take this, and I know you won't, coming from the divine power as it developed down, that this is just an act of mercy to be granted, that then went into the sovereign, the Governor and so forth, and has worked its way into this Board.

I don't think there's a jealousy on the part of the Board to keep that prerogative, that they're above everything. But I do think that we consider ourselves in a category far different than the Parole Board or the courts. You don't even have that power as a judge. There are certain restrictions you have. If a person is found guilty, you have to go by certain statutory requirements.

There is absolute power on the part of this Board to grant this pardon.

Q I don't think you're right about that, you know.

A All right.

Q I mean the divine right to pardon or the regal right to pardon did, you know, sort of filter down into the system we have in this country. But there has never been anybody who has any real thoughtful support for the view that a Governor, or anybody else, has a divine right.

A I agree, especially in Connecticut. Connecticut never gave it to us.

Q Well, they never gave it to the Governor in Connecticut and Judge Ribicoff washed his hands of all responsibility by getting this law passed and says we'll have a bunch of fellows and let them look at these cases and decide what to do.

And the only thing is now that we've got men doing it who are appointed by the legislature or the Governor, why shouldn't they have the slight responsibility placed upon them to say why they do it? If you're going to take refuge in the fact we don't need to say it because we have a divine right —

A I don't think I used that term, your honor.

Q No. That's me.

A Okay.

Q But we have, you know, an unimpeachable, unquestionable right to decide whether mercy shall be given or not.

MR. O'NEILL: He certainly does have a point, your honor.

THE COURT: What?

MR. O'NEILL: He certainly does have a point.

THE COURT: There's a point, if you want to read the case —

MR. O'NEILL: When President Ford denied Haldeman and Erlichmann pardons, and Mitchell pardons, did he have a constitutional obligation to give him a reason why he did?

THE COURT: I don't know.

MR. O'NEILL: I don't mean to address an inquiry to the Court.

THE COURT: I don't know.

MR. O'NEILL: I certainly claim he had no constitutional obligation to give them a reason, and he didn't give them a reason.

THE COURT: Well, it doesn't come up in that case. He gave them one, didn't he?

MR. O'NEILL: It's the same pardon.

THE COURT: Did he deny?

MR. O'NEILL: He denied them.

THE COURT: All right. Well, maybe they should challenge him. We've got challenges here.

But just because Haldeman didn't challenge him doesn't mean that Dumschat can't.

MR. O'NEILL: Can I ask a question? I don't mean to interrupt you.

THE COURT: You can ask me too, I guess.

MR. O'NEILL: I don't mean to you; to the witness.

THE COURT: Sure.

BY MR. O'NEILL:

Q Mr. McQuillan, if the Board had to give individual I withdraw that.

I gather that, from the gist of your testimony, you're saying that the reason for denying a pardon may vary from case to case; sometimes it's the seriousness of the offense, sometimes it's bad psychiatric report, sometimes there may be a bad institutional record —

A Yes sir.

Q — and a variety of other things?

A I'd like to think we treat each person individually and on his own merits.

Q Okay. So it's not always the same reason for denying a pardon?

A No. And there's no restriction whatsoever on anyone who comes before us.

The only thing that we might do is that if we have a record on someone who has come before us seven or eight times, unless there's something new and additional, we might ask him to limit. But he is not required to do so. And he may engage, or his counsel, in an adversary proceedings with the state's attorney who is there, who might object to the granting of a pardon.

They can counter that, as far as we're concerned. I know of no restriction we've ever placed on anybody in presenting their argument.

Q So if I appeared before the Board of Pardons I can bring in any witness I want to?

A That's correct.

Q I can submit any documents that I may have?

A Correct.

Q Within the limits of reason, I suppose?

A As long as it is pertinent to the granting of a pardon.

It may at times seem rather extraneous, but there are many considerations we can give that should allow for this person to be released.

Q Okay. But there's no restrictions on what I can do to attempt to persuade the Board to exercise its authority and give me some sort of relief?

A The only thing that I did have some concern with, and his honor has asked me about, is his own decision in the Dumschat case which seems to restrict it to people with life terms after having served two-thirds, let's say, of their sentence. And I'm wondering if we are going to give reasons, are we going to give reasons to everyone; and that is the inmates, the non-inmates.

Because, you know, we have several sessions a year, your honor, for non-inmates; people who have committed all sorts of crime —

THE COURT: You mean they are not in confinement?

A Oh, yes. What has happened in this state, your honor, is let's say you have somebody who is going up, this is a common thing, to be an officer in a company, and when he was 17 years old, in college, he had a marijuana rap, and nobody even knows about it in the family, and he wants it off his record; or, somebody has been in prison and he's going to die.

We have as many as 60, 70, 80 of those come before us twice a year. Many of those are denied. But we are granting up around 60, 70 —

THE COURT: I don't think we have that class before us. The only class we have are inmates.

MR. O'NEILL: That's right. And lifers.

THE COURT: What?

MR. O'NEILL: Inmates serving life sentences. That is the class.

MR. HANLEY: That is correct.

THE WITNESS: At this time.

THE COURT: At this time, yes.

BY MR. O'NEILL:

Q Well, the question I was trying to lead up to, Mr. McQuillan, is if the Board is required to give individualized statements every time it denies a pardon, in terms of administrative burden how is that going to affect the opportunity of inmates to appear before the Board?

THE COURT: How would it affect the inmates?

MR. O'NEILL: Yes.

Q I mean, in other words, you hear some what 50 or 60 hearings a day?

A Yes.

THE COURT: I don't think we are concerned with how it's going to affect the inmates.

MR. O'NEILL: I think it is important, your honor, if it means that I —

THE COURT: You mean there's a reason for not telling them.

MR. O'NEILL: Yes.

THE COURT: All right.

MR. O'NEILL: You know, if it means I won't appear for another six months, I think that's an important thing for the Court to know.

If it means because the Board of Pardons has to give an individualized statement of reasons, instead of hearing 50 or 60 cases, that you can only hear 20 cases —

THE COURT: Well, I don't know.

MR. O'NEILL: That's what I'm asking.

THE COURT: All right.

A I'm not sure I really understand.

THE COURT: Is it going to take you any longer?

Q (By Mr. O'Neill) Will it reduce the number of people that you can hear in the course of a day?

A I would say no.

Q No?

THE COURT: You don't have to make them like it. All you have to do is say this is the reason.

Q (By Mr. O'Neill) But if you have to give an individualized statement of reasons, you think you could still hear the same number of cases as you are hearing now without a statement of reasons?

A I think it would certainly increase the responsibility of our secretary, and we have a very limited budget, we only have one person who is a practicing attorney who works on a part-time basis for our Board who accumulates all the information and presents the files to us. He's the one that's responsible for giving them their answer.

And I think that there would certainly have to be some increase in the staff responsibility. And I do really believe that if we're going to be fair to him, and we're going to give a reason, it should be a good and legitimate reason; not a stereotype run of the mill.

Q What I'm suggesting is, and I certainly don't presume to speak for the Court, but I think the Court would be interested in knowing whether or not, if it issues the order that is requested, it would mean that inmates who would be heard today will not be heard for another six months. I respectfully submit that the Court would be interested in knowing that. And that's my question. Do you think that would be the result?

A I really don't think it would. I think that if, under the procedure we use, I think that we would just have to make ourselves available for another day.

If our workload were to go over, we couldn't get it all done

that Monday, I think we would have the responsibility as we are set up now to go over into another day.

It would create problems in the transporting of these — no, they are transported from various parts of the state into the institution.

BY THE COURT:

Q Well, you say you would have to go over for another day?

A It could very well, your honor. If we're going to —

Q Well, that depends upon how many cases you had that day?

A Certainly, yes sir. And it depends upon —

Q Well, have you got any estimate as to how many you could dispose of without this requirement, and how many fewer it would limit you to if you had this requirement?

A Your honor, I think that the procedures that we have are very common to what you have when a lawyer says, I only have two questions, it will only take me five minutes with this witness, and you're sitting here three days later with a witness on the stand.

I can look at a docket and think I'm going to be out of the prison at four or five o'clock in the afternoon, and I'm not out much later than that because somebody takes up a great deal of time. We really don't know how we're going to control that docket.

Q But we're just talking about stating the reason for denial. You deny. And if you state the reason, you can state it

there orally, I suppose, or you can state it for the record and then a notice to the applicant: "Denied. Reason: It would be a danger to society to release you into the general population at this time"; or, "The seriousness of your offense is so great that it would deprecate it".

Now, to a certain extent I would think that you can't avoid what you call a stereotype kind of expression of a reason and the requirement of a further explanation would not come about too often. I don't know.

A I don't know how frequently it would. I'm not sure of how many individual cases, but some of them are repetitive, your honor. I don't know percentage wise, but I know that I have received my stack in preparation for the first hearing in April, which I'm starting to go through.

Many of them I only have to take a cursory examination because I've met them three or four times before. If it's something new, I'll look at it. If not, I'll just go on to a new one.

Q All right. And I suppose when you come the other members of the Board already have more or less arrived at a tentative opinion as to how it should be disposed of.

A We have quite a bit of information by the time we —

Q You exchange information before you even get there?

A Every letter and document that is presented by an individual on his behalf, that goes to the secretary and is disseminated to all the members prior to our meeting.

Q I know. But do you have any discussion beforehand as to what you think ought to be done in a particular case? Does that happen regularly?

A No, your honor.

Q Occasionally, maybe?

A The main thing that we discuss in our executive session, prior to going into the meeting, is whether or not the person should even be heard. We have certain requirements about having been heard before or what their situation is. That would be the only thing.

But as far as the individual himself, we don't discuss him until after he has presented his case.

* * * * * *

CROSS-EXAMINATION:
BY MR. HANLEY:

Q Mr. McQuillan, have any absolute pardons been given to inmates in recent years? Have you given any pardons where you have cut the inmate loose, without just making him eligible?

A I want to distinguish between that.

Yes, we have. But when you say "absolute pardon", that entails, as his honor said, a lot of things. It just wipes the record clear. That we have not done. We have pardoned him for time served.

Q And you have not required him to go before the Board of Parole?

A That is true.

Q And how many cases have you done that in?

A I would say two or three.

Q Two or three total?

A Yes sir.

Q Generally, when you grant a pardon, you grant a conditional pardon which makes the inmate eligible for parole before completing the minimum sentence that he was sentenced to?

A That is a fair statement.

If I may, one that comes to my mind, at our last session, I believe it was an attorney represented a client before us, we denied the pardon. I think it was based upon the crime he had committed. The severity, the short period of time he had been there.

Within three or four days of that he was admitted to the prison hospital, was found to be terminal, and it was estimated by the medical profession that he would not have six months to live.

We were asked to give special consideration to him. We did. We did it via telephone conferences and so forth, took a vote, and he was granted pardon and was released.

Q But that's a rare case?

A It is.

Q And sometimes when you grant these conditional pardons you make the inmate immediately eligible for a parole, so that he can go before the Parole Board at the next hearing?

THE COURT: Eligible for parole consideration.

Q Parole consideration.

A That has been done, yes.

Q And then in other cases you make the inmate eligible for parole consideration not at the time you grant him a pardon, but at some intermediate date between when you grant him the pardon and when he would have become eligible for parole if you had not granted him the pardon?

A If I understand your question properly, it might be that let's say there's a lifer who has only served 12 years. We might reduce it to minimum of 20 years, which would mean that perhaps in four years he'd be eligible for parole.

I think the philosophy of the Board in that particular subject is that other than new statutes, where you have 10 to 25 years minimum up to a maximum of life, that some of these people should have hope within the prison institution that there is going to be consideration given to them sometime in their lifetime. And after they've been there long enough we try to give them that hope.

Q Thank you.

You're aware that this case deals with lifers?

A Yes, I am.

Q And all of the lifers have committed a fairly serious crime, in your opinion, is that correct?

A That's true, yes.

Q And so is it your opinion that if you were forced to give a statement of reasons, that would not be fair to the inmate, the

life inmates who are lifers, just to say that they committed a serious crime?

A I think that, if I can answer that properly, I hope, some of them, if we were going to be fair with them, it might be very discouraging and very depressing. I think there are people who have come before me, if I'm going to be fair and honest with his Court, that I don't think I could, in good conscience, ever vote to give them a pardon.

And I really don't think I'd want to tell him that because there might be something from that Board two years from now that might have different philosophy than I, and different feeling, and might grant him that pardon.

For him to know that it would never be granted by the presently constituted Board, no matter what he did he was not going to earn consideration for a pardon, I think could be very demoralizing. It's bad enough being in there and facing the situation, but we could, I think, compound it if we took that. And there are people who I think you can appreciate fit within that category.

Q The point I was getting at was we're dealing here with lifers and there are significant number of lifers who do receive pardons. Is that correct?

A There are, yes.

Q And then there are some lifers who do not receive pardons?

A That's correct.

Q Therefore, your differentiation is not made solely on the basis of the seriousness of their crime?

A That is a fair statement.

Q And so you consider various factors when you consider their applications for pardons, correct?

A Yes. Also we consider what they ask for. Many of them come before us and state specifically what they want.

For instance, they'll come and say: We know you're not going to let me out of here today, I know I've been bad, I've got to pay, but could you give me this consideration so I can get on the work release program; or, if you give me a certain amount of time I'll be able to go out and go to school and take advantage of different programs.

If these are shown to be legitimate, we will give consideration to that, to allow that person to take advantage of some of the institutional provisions, or what his own particular goal is. It might be reasonable, and we'll give consideration to that.

Q And when you deny a pardon in different cases you consider various factors. For instance, you'll consider the prior criminal record of the applicant?

A Yes.

Q And you'll consider the circumstances surrounding his crime?

A That's correct.

Q And you'll consider any psychiatric reports that might be in the file?

A Yes.

Q And his conduct while incarcerated?

A Yes.

Q And his prospects for leading a crime-free-life if released, for instance future employment, family situation, things like that; those factors would be considered?

A Yes. I think that, you know, there have been prisoners that have come before us that have been institutionalized so long in their life that almost to let them out the records would indicate that they're not capable of functioning in society because they have been so institutionalized that they have become completely dependent upon it. Even though on an act of mercy you might want to let them out you wouldn't be doing them —

THE COURT: For his own good he ought to stay there - that's the view?

THE WITNESS: Oh, no. I think it's not based upon just — there's usually quite a bit —

BY THE COURT:

Q Well, I mean it would be unfair to him to let him out because he can't cope, so we're not going to give him the chance to get out, we'll keep him here; sort of a beneficent governmental attitude?

A No.

Q Well, now, I don't say that it doesn't spring from the pure well springs of charity in your heart, the milk of human kindness, but I just know whether —

A It goes along with some of the other questions asked by the attorney, your honor, that he was asking. Did he have a place to go, a family unit to sit in with, something that he could do, you know, to make himself a part of society.

Q Whether he can cope or not.

A Yes, whether there is any means to take care of him.

THE COURT: All right. Conditions to cope with.

BY MR. HANLEY:

Q You also consider what the state's attorney says at the hearing?

A Yes.

Q So when these cases of the lifers come before you, when you apply for a pardon, in some cases you deny the pardon for some reasons, and in some cases when you deny a pardon you deny it for other reasons?

A That's true.

Q And you weigh the factors differently in different cases?

A We weigh all the factors in every case, but in some of them the factors have a different effect, depending upon what they relate.

I think you just mentioned, for instance, conduct in prison. Some people, they think it's horrible that a young man is put into that prison and gives a lot of fresh talk to a guard and he's sounding off.

My personal feeling, if somebody put me in prison today they'd take a few years before they'd be able to keep me from shutting up and sounding off about this system. I don't really —

THE COURT: You mean you think you would start to complain right away?

THE WITNESS: Your honor, my feeling on it, if a person —

THE COURT: Do you know how many merit points you have to earn from the prison population before you're allowed to talk out of turn? You've got to work yourself up from the ranks before you're allowed to speak, even for yourself, there I'm told.

THE WITNESS: Excuse me. I didn't mean it —

THE COURT: Go ahead.

BY MR. HANLEY:

Q Now, each inmate after he served one year of his sentence each inmate can appear before you annually to apply for pardon, is that correct?

A Yes.

Q How many sessions a year do you have with inmates?

A Four.

Q Four sessions. And are you aware that Mr. O'Neill is about to admit in his answer that there are currently 35 inmates serving life sentences?

A I don't know, but it doesn't surprise me.

MR. O'NEILL: I haven't discussed that.

THE COURT: Well, so what?

Q (By Mr. Hanley) So on the average you would have

nine inmates at most appearing before you at each session for inmates?

A Nine?

Q If there were nine inmates serving life sentences who appear before you at each session —

MR. O'NEILL: Actually, I am told there are more than 35.

THE COURT: So he has a dozen each time of lifers, if you have four hearings a year.

A I think the last time, if I recall, I think I had about 19 of them.

Q Okay. That would be 19 out of 60, is that correct?

A If that's what the statistics are. I don't dispute it.

Q And is it the aim of the pardons board to consider the success of applications as consistent a way as possible, success of applications by one inmate?

A To consider them how?

Q As consistently as possible. You know, if he appears before you one year, you consider the same factors that you would consider the next year and the next year?

A Unless he brings something new or unless we independently, either from the correctional institution, or some other source, or the state's attorney changes its position. I didn't read the whole argument, but yesterday I understand we've had the Ronnie McLucas case before us many times and the state's attorney has just violently opposed it. And I under-

stand he's going to recommend now that he be released.

THE COURT: Who? Bobby Seale?

THE WITNESS: No. The other one.

Is it Ronnie McLucas?

MR. O'NEILL: Lonnie McLucas.

THE COURT: Lonnie McLucas.

The Panthers have been disbanded now and —

THE WITNESS: I think for some reasons he's changed his position on it.

THE COURT: Yes.

Q (By Mr. Hanley) Generally, then, if a lifer appeared before you one year after another after another, the reasons would often be the same for denying him pardon?

A Yes, it could very well be.

MR. HANLEY: We have no further questions, your honor.

MR. O'NEILL: I have no further questions.

(Witness excused)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1997

CONNECTICUT BOARD OF PARDONS, ET AL.

Petitioners

-vs-

DAVID DUMSCHAT

Respondent

JAMES BROWN, STANLEY CZAJA and

JAMES SHELTON

Intervening Respondents

CONNECTICUT BOARD OF PARDONS, ET AL.

Petitioners

-vs-

JAMES BROWN, STANLEY CZAJA and

JAMES SHELTON

Respondents

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondents James Brown and Stanley Czaja, who are currently incarcerated in the Connecticut Correctional Institution at Enfield, Connecticut, ask leave to file their Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Respondents' brief was mailed June 25, 1980. Their affidavit in support of this motion will be sent under separate cover. The two other named representatives of the Respondent class in this action, DAVID DARNSCHAT and JAMES SHELTON, have received pardons and hence the action is moot as to their individual claims and they are not filing affidavits to proceed in forma pauperis.

Stephen Wizner

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Counsel for Respondents

CERTIFICATION

I hereby certify that a true copy of the foregoing was mailed to Stephen J. O'Neill, Esq., Assistant Attorney General, 340 Capitol Avenue, Hartford, Connecticut, this 25 day of June, 1980.

Stephen Wizner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

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CONNECTICUT BOARD OF PARDONS, ET AL.

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v.

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Intervening Respondents

CONNECTICUT BOARD OF PARDONS, ET AL.

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JAMES BROWN, STANLEY CZAJA AND JAMES SHELTON

Respondents

BRIEF IN OPPOSITION TO A

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO A

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FOR THE SECOND CIRCUIT

OPINIONS BELOW

The respondents, a class composed of approximately 35 inmates serving life terms of incarceration in the Connecticut correctional system, adopt the statement of the petitioners (Connecticut Board of Pardons), and direct the attention of the Court to the opinions appended to the petition.

JURISDICTION

The respondents adopt the statement of the Connecticut Board of Pardons.

QUESTION PRESENTED

The respondents adopt the statement of the Connecticut Board of Pardons.

CONSTITUTIONAL PROVISION INVOLVED

The respondents adopt the statement of the Connecticut Board of Pardons.

STATEMENT OF THE CASE

Procedural History

In February, 1976, David K. Dumschat instituted an action in the District Court for the District of Connecticut. At that time he was serving a sentence of life imprisonment at the Connecticut Correctional Institution at Enfield following a homicide conviction in 1964. Prior to February, 1976, Mr. Dumschat had appeared before the Board of Pardons several times but had never been told why he had been denied a pardon. After an evidentiary hearing and additional submissions of written evidence by the Connecticut Board of Pardons, Judge Blumenfeld issued a declaratory judgment on June 16, 1977, that Mr. Dumschat was entitled to a written statement of reasons and the facts relied upon when the Board of Pardons denied him a pardon. Dumschat v.

Connecticut Board of Pardons, 432 F. Supp. 1310 (D. Conn. 1977). However, also on June 16, 1977, Mr. Dumschat received a pardon from the Board of Pardons, which reduced his minimum sentence to time served.

The Board of Pardons appealed Judge Blumenfeld's judgment to the United States Court of Appeals for the Second Circuit. On August 16, 1977, the Board of Pardons filed a motion with the Court, requesting that the judgment of the District Court be vacated and that the case be remanded. On August 29, 1977, the Board filed a motion with the District Court to vacate the judgment and dismiss the complaint as moot. On September 13, 1977, David Dumschat consented to have the suit remanded to the District Court.

On December 20, 1977, while the two motions were pending, James Brown, Stanley Czaja, and James Shelton filed a separate action claiming that their constitutional rights to due process of law had been denied when the Board of Pardons denied them pardons without providing a statement of reasons for each denial. All three were serving life sentences at the Connecticut Correctional Institution at Enfield and had been denied a pardon without being given a statement of reasons.

In January, 1978, the Court of Appeals remanded Mr. Dumschat's suit without further instructions. Following Judge Blumenfeld's denial of the motions to vacate the judgment and dismiss the complaint, Brown, Czaja, and Shelton filed motions to intervene in Dumschat, to consolidate their action with Dumschat, and to have this consolidated action certified as a class action.

The Board of Pardons did not oppose any of these motions and Judge Blumenfeld granted them. The parties agreed and Judge Blumenfeld ordered that the record in Dumschat be included in the consolidated actions. By stipulation of the parties, the record in Carrona v. Manson et al. (D. Conn., Civil No. H-74-377) was also made a part of the record in this action. Carrona involved

a similar claim, but was dismissed as moot before decision when Mr. Carrona received a pardon.

On August 16, 1978, Judge Blumenfeld ruled in favor of the plaintiff class, ordering that the Board of Pardons furnish any inmate serving a life sentence with a written statement of reasons and facts relied upon when the inmate is denied a pardon by the Connecticut Board of Pardons when the nature of the pardon would be reduction of sentence and advancement of parole eligibility. Dumschat v. Connecticut Board of Pardons, 462 F. Supp. 509 (D. Conn. 1978).

On September 29, 1978, the Board of Pardons appealed the judgment to the United States Court of Appeals for the Second Circuit, where argument was heard on January 9, 1979. The Court of Appeals on January 11, 1979 issued a per curiam decision affirming the District Court's judgment and opinion. Dumschat v. Connecticut Board of Pardons, 593 F. 2d 165 (2d Cir. 1979).

The Board of Pardons petitioned this Court for a writ of Certiorari. The petition was granted on June 11, 1979, when the Court vacated the judgment of the Court of Appeals and remanded the case to that Court "for further consideration in light of Greenholtz v. Inmates of Nebraska Penal Complex, 442 US [1]"

After requesting and receiving additional briefs which dealt with the applicability of Greenholtz to the instant case, the Court of Appeals for the Second Circuit once more ruled in favor of the respondents. On March 20, 1980, the Court held that "the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process" and that "the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons." Connecticut Board of Pardons v. Dumschat, No. 78-2124, p.1961. The Court did not enter a final judgment but remanded the case to the district court "to determine at what point in an

inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to invest him with a protected 'liberty' interest and due process rights." No. 78-2124 p. 1962.

Despite the fact that this case is now before the District Court in accordance with the Second Circuit's remand, petitioners have applied for a writ of certiorari from this Court. For the reasons set forth below, respondents contend that the petition should be denied.

REASONS FOR DENYING THE WRIT

I. A WRIT OF CERTIORARI CANNOT BE GRANTED BECAUSE A FINAL DECREE HAS NOT BEEN ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Rule 20 of the Rules of this Court states:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

As noted above, this case has been remanded by the Court of Appeals to the District Court, and no showing of special importance has been made, or even alleged, by the petitioner. A grant of the petition would thus be inconsistent with the Rules of this Court and would entail a departure from the settled doctrine of this Court as laid down in Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 US 251, (1916) a case rather similar to this one. Hamilton-Brown involved a complaint of trademark infringement and unfair competition. The trial court had originally dismissed the complaint, but its decision was reversed by the Eighth Circuit Court of Appeals which found the defendant guilty of unfair competition and remanded the case to a special master for consideration of the issue of damages. The defendant thereupon petitioned the Supreme Court for a writ of certiorari. The writ was denied. Eventually, the master's finding of damages was appealed to the court of original jurisdiction; that court's finding was appealed to the Court of Appeals for the Eighth Circuit, and only after the appellate court had entered a final decree for damages did the

Supreme Court grant certiorari. In his opinion for the Court, Mr. Justice Pitney responded to the plaintiff's contention that the Court's initial denial of certiorari precluded consideration of all issues but that of damages. He wrote that the initial denial of certiorari had not been predicated in any way upon the Court's agreement or disagreement with the Eighth Circuit's opinion but upon the fact that the issue had not been ripe for review.

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision....And, except in extraordinary cases, the writ is not issued until final decree....The decree that was sought to be reviewed by certiorari at complainant's insistence was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application....."

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 US 251, 258.

This Court's decision in Hamilton-Brown has never been overruled. In Brotherhood of Locomotive Firemen & Engineermen et al. v. Bangor & Aroostock Railroad Co. et al., 389 US 327 (1967), the decision was relied upon by the Court in its denial of certiorari. The District of Columbia Circuit Court of Appeals had decided several questions, but had remanded the case to the District Court for consideration of whether the defendants had been properly held in contempt of court. The Supreme Court refused to grant a writ of certiorari to consider any of the issues decided by the Court of Appeals while the remand was pending. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this court." Brotherhood of Locomotive Firemen & Engineermen et al. v. Bangor & Aroostock Railroad Co. et al., 389 US 327, 328.

This Court's decisions in Hamilton-Brown and Brotherhood of Locomotive Firemen preclude a grant of certiorari at the present time. The Court of Appeals for the Second Circuit has remanded this case for further evidentiary proceedings for the important purpose of determining the circumstances under which life inmates acquire a protected liberty interest in sentence commutations.

So long as this crucial issue remains unresolved and no final decree has been entered, this case is not ripe for the Supreme Court's review.

II. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DOES NOT DECIDE A FEDERAL QUESTION IN A WAY WHICH IS IN CONFLICT WITH AN APPLICABLE DECISION OF THE SUPREME COURT.

Rule 19.1.(b) of the Rules of this Court provides that one of the factors considered by the Court in deciding whether to grant or refuse a writ of certiorari is the question of whether "a court of appeals....has decided a federal question in a way in conflict with applicable decisions of this court...." Petitioner asserts that the recent decision of the Second Circuit is in conflict with this Court's decision in Greenholtz v. Inmates of Nebraska Penal Complex, 442 US 1, 1979. However, the Second Circuit devoted extensive consideration to Greenholtz, as it had been instructed to do by this Court, and held:

> "The overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected interest in pardon proceedings. ....We find nothing in Greenholtz that precludes this holding."

Connecticut Board of Pardons v. Dumschat. No. 78-2124 pp. 1968-9.

The petitioners' claim that the Second Circuit did not act in agreement with the decision of this Court in Greenholtz is further belied by the fact that on two other occasions the Second Circuit overruled previous decisions in order to comply with Greenholtz. In Boothe v. Hammock, 605 F. 2d 661 (2d Cir. 1979), the Second Circuit overruled its decisions in United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F. 2d 925 (2d Cir.), vacated as moot sub nom. Regan v. Johnson, 419 US 1015 (1974), and in Coralluzzo v. New York State Parole Board, 566 F.2d 375, (2d Cir. 1977), cert. dismissed as improvidently granted, 435 US 912, in holding that the establishment of a parole system does not create liberty interests in parole proceedings sufficient to trigger due process rights. A similar holding was reached in Pugliese v. Nelson, Nos. 79-2136, 2138, 2140 (2d Cir. March 4, 1980), which

overruled the decision reached in Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975), that the threat of "grievous loss" warranted due process protection. The Second Circuit has thus applied the dictates of Greenholtz extremely conscientiously, and petitioner's claim that the decision in this case contradicts Greenholtz is without merit.

III. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THIS COURT'S OPINION IN SCHICK v. REED.

Schick v. Reed, 419 US 256 (1974), is in no way applicable to the present case. In Schick, this Court held that Article 2, Section 2, Clause 1 of the United States Constitution conferred upon the President the power to grant conditional pardons. In doing so, the Court noted the "plenary" nature of the pardoning power. 419 US 256, 266. Petitioner seeks to analogize between this presidential power and that of the Connecticut Board of Pardons. The analogy fails for several reasons. First, the authority of the Board is statutory and is in no way predicated upon Article 2 of the United States Constitution. Second, the decision in Schick was in part founded upon an examination of "[t]he history of our executive pardoning power." 419 US 256, 262. The Second Circuit examined the history of the exercise of the pardoning power by the Connecticut Board of Pardons and held that the history itself had created a liberty interest sufficient to trigger the requirements of due process. Schick v. Reed is thus inapposite to the present case.

IV. THIS CASE DOES NOT PRESENT A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As the petitioner notes, Rule 19.1.(b) of the Rules of this Court provides that one of the factors relevant to the Court's decision to grant or deny a writ of certiorari is whether "a court of appeals has....decided an important question of federal law which has not been, but should be, settled by this court...." This case does not pose such a question because the Second Circuit's recent opinion is narrowly based upon the past practice of the

Connecticut Board of Pardons' exercise of its sentence commutation power. It is based upon unique circumstances and limited in its applicability. The Supreme Court has already established guidelines for determining the existence vel non of interests protected by due process in the series of cases beginning with Board of Regents v. Roth, 408 US 564 (1972), and continuing through Greenholtz. As the Second Circuit acknowledged throughout its opinion, this case is controlled by those guidelines. No novel issue of federal law is presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Law Student Intern

CERTIFICATION

This is to certify that on this ___ day of June, 1980, two copies of this petitione for a writ of certiorari were mailed, postage prepaid, to Stephen J. O'Neill, 340 Capitol Avenue, Hartford, Connecticut, counsel for Petitioners.

Supreme Court, U.S.
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No. 79-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CONNECTICUT BOARD OF PARDONS, Et Al
Petitioners

v.

DAVID DUMSCHAT
Respondent

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Intervening Respondents

CONNECTICUT BOARD OF PARDONS, Et Al
Petitioners

v.

JAMES BROWN, STANLEY CZAJA and
JAMES SHELTON
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Has the practice of the Connecticut Board of Pardons in reducing the minimum terms of inmates sentenced to life sentences in Connecticut thus accelerating their eligibility to be considered for release to the community by the Connecticut Board of Parole given such inmates after serving an as yet judicially undetermined amount of time, a protected liberty interest such that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that such inmates, when they reach this as yet undetermined point in their sentence, be given written explanations of adverse decisions by the Board of Pardons?

LIST OF PARTIES

This is a class action. The plaintiff class consists of all inmates currently serving sentences of life imprisonment in the Connecticut Correctional Institutions at Somers and Enfield and who have been or will be denied pardons during their current terms of imprisonment of incarceration by the Connecticut Board of Pardons.

The class consists of all so-called "lifers" who are serving what is commonly referred to as a "straight life" sentence. This is a life senetence which contains no court imposed minimum term. The minimum term of such a sentence is determined according to the formula discussed in footnote 1 at page 5, infra.

There is also a group of inmates serving sentences the maximum term of which is life and the minimum term of which as imposed by the sentencing court can be not less than ten (10) nor more than twenty five (25) years. See Section 53a-35(c) (1) Connecticut General Statutes. This latter group of inmates are not parties to this action. These sentencing procedures are the result of statutory changes which are not applicable to these plaintiffs or to the class which they represent.

The defendants consist of the members of the Connecticut Board of Pardons.

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I

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Respondents

BRIEF FOR PERITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 618 F.2d 216 (1980) and is also printed at pp. 2a-16a in the Petitioners' Appendix to their Petition For a Writ Of Certiorari.

This opinion and judgment of the Second Circuit were rendered following the order of the Supreme Court in *Connecticut Board of Pardons, et al v. David Dumschat, et al*, No.

78-1533, entered on June 11, 1979 which provided as follows:

"The motion of respondents for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. (1979)." See _____ U.S. _____, 99 S.Ct. 2854 (1979). See Petitioners' Appendix to their Petition For a Writ of Certiorari p. 17a.

The previous opinion of the Second Circuit upon which this Court's order of June 11, 1979 was based is reported in 593 F.2d 165 (1979) and appears in the Petitioners' Appendix to their Petition for a Writ of Cetiorari at pp. 18a-20a.

The opinion of the District Court for the District of Connecticut is reported in 462 F. Supp. 509 (1978) and appears in the Petitioners' Appendix to their Petition For a Writ of Certiorari at pp. 21a-25a. Incorporated in its decision is an earlier decision from the District Court in *Dumschat v. Board of Pardons*, 432 F. Supp. 1310 (D.Conn. 1977).

JURISDICTION

The opinion and judgment of the United States Court of Appeals For The Second Circuit were rendered on March 20, 1980. The Petition For A Writ Of Certiorari was filed with this Court on June 18, 1980. The Petition was granted on October 14, 1980. On the same date this Court granted "[t]he motion of the respondents Brown and Czaja for leave to proceed *in forma pauperis*. . ."

This Court's judisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In February, 1976, David K. Dumschat instituted an action in the District Court for the District of Connecticut claiming in essence, that he had been deprived of a federally protected right within the purview of 42 U.S.C. 1983 because the Connecticut Board of Pardons had, on a number of occasions, denied him a pardon and on no occasion did the Board provide him with a statement of reasons for this denial. Dumschat's claim was that he was entitled to such a statement under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

At that time, Mr. Dumschat was confined in the Connecticut Correctional Institution, Somers, serving a life sentence imposed in 1964 for the crime of murder in the second degree. (See *Dumschat v. Connecticut Board of Pardons*, 432 F. Supp. 1310, 1311 (D. Conn. 1977).

In that action Judge Blumenfeld concluded that ". . .due process attaches to the denial of a pardon to an inmate like Dumschat sentenced to life-imprisonment who has served almost two-thirds of his minimum term." *Dumschat v. Connecticut Board of Pardons*, 432 F. Supp. 1310, 1315n.17 (D. Conn. 1977).

The Court further "conclude[d] therefore that the fourteenth amendment requires that the Connecticut Board of Pardons furnish plaintiff a written statement of reasons and facts relied on when he is denied a pardon."*Dumschat*, supra, p. 1315.

The authority to pardon which is involved is the authority of the Connecticut Board of Pardons under Section 18-26, Connecticut General Statutes, to reduce the minimum term of an inmate including, of course, an inmate serving a life term, thereby accelerating the inmate's eligibility for consideration for release to the community by the Connecticut Board of Parole. (See, *Dumschat v. Board of Pardons, State of Connecticut*, 432 F. Supp. 1310, 1312 (D. Conn. 1977) and the opinion of the Second Circuit following remand, reported in 618 F.2d 216, 217, footnote 1, Petitioners' Appendix to their Petition For A Writ of Certiorari, p. 5a footnote 1).

The Board of Pardons took an appeal to the United States Court of Appeals for the Second Circuit from that judgment.

On June 16, 1977, Dumschat was given relief by the Board of Pardons. The parties agreed that this relief rendered the appeal moot pursuant to *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *Holup v. Gates*, 544 F.2d 82 (2d Cir. 1976) cert. denied, 430 U.S. 941, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977).

By order of the Court dated January 12, 1978, the case was remanded to the District Court.

In December, 1977, James Brown, Stanley Czaja and James Shelton, each of whom are also serving life sentences, filed an action in the District Court making the same claims as Dumschat.

As with Dumschat, these three plaintiffs had been denied a pardon without being given a statement of reasons.

Brown is serving a life sentence for murder which was first imposed in 1967. Absent any reduction in his minimum term [1] by the Board of Pardons, he will be eligible for parole in 1987. (Paragraphs 18-19 of the Complaint, Joint Appendix p. 11).

Czaja is serving a life sentence for murder in the second degree which was imposed in 1962. Absent any reduction in his minimum term by the Board of Pardons he will be eligible for parole in 1982. (Paragraphs 28-29, of the Complaint, Joint Appendix p. 13).

Shelton is serving a life sentence for murder in the second degree which was imposed in 1969. Absent any reduction in his minimum term by the Board of Pardons he would have been eligible for parole in 1989. (Paragraphs 38-39 of the Complaint, Joint Appendix, p. 15).

Although it does not appear in the Record, since it occurred after the last evidentiary hearing in the District Court, Shelton's minimum term was reduced by action of the Board of Pardons on October 23, 1978.

The defendants moved in the District Court to vacate its judgment in *Dumschat* and to dismiss as moot. This motion was denied.

---

[1]Insofar as these plaintiffs and the class which they represent are concerned, their parole eligibility is governed by those provisions of Sec. 54-125, Conn. Gen. Stat. which, at the time these men were sentenced provided that "Any person . . . if sentenced for life, after having been in confinement under such sentence for not less than twenty-five years, less such time, not exceeding a total of five years, as may have been earned under the provisions of section 18-7, may be allowed to go at large on parole . . . "

So-called "lifers" such as these plaintiffs, absent relief from the Board of Pardons must, therefore serve a minimum of twenty years less "jail time" credit, if applicable, in order to be eligible for parole. *Holmquist v. Manson*, 168 Conn. 389, 362 A.2d 971 (1975).

The plaintiffs in both actions in the District Court were represented by the same counsel. The plaintiffs Brown, Czaja and Shelton filed a Motion to Intervene in *Dumschat*, to consolidate their action with *Dumschat*, and to have the consolidated action certified as a class action.

All of these motions were granted by Judge Blumenfeld.

An additional evidentiary hearing was held in the District Court at which the parties agreed and the Court approved that the record before the Court in *Dumschat* would be included in the record in the consolidated actions then before the Court as well as the record in a previous similar action which became moot after trial but before decision. *Carrona v. John R. Manson, et al.* (D. Conn.). Civil No. H-74-377.

Judge Blumenfeld reached the same conclusion that he had reached in his earlier decision in *Dumschat* and, in addition, went beyond that earlier decision and held that:

> "Therefore, because an inmate's liberty interest is seriously affected by the pardon procedure, I need not 'draw the constitutional line' in the present action.[2] In a pardon hearing of an inmate sentenced to life imprisonment, the Due Process Clause protects the inmate's interest in obtaining reasons for denial of pardon irrespective of the time served on his sentence when his pardon application is considered.
>
> "After hearing the testimony of the present Chairman of the Board of Pardons, it appears that the conditions present at the time of my original decision

---

[2]As noted above, Judge Blumenfeld's previous decision was limited to persons sentenced to a term of life imprisonment who have served " . . . almost two-thirds of [their] minimum term."

> on this matter continue to exist without interruption or change. Therefore, in all respect, I adhere to my prior decision in this matter and rule that the Connecticut Board of Pardons furnish any member of the plaintiff class a written statement of reasons and the facts relied on when he is denied a pardon." (See *Dumschat v. Board of Pardons*, 462 F. Supp. 509, 511-12 (D. Conn. 1978), Petitioners' Appendix to Petitioners' Petition For A Writ of Certiorari, p. 25a.

Two judgments were entered in the District Court, one in *Dumschat* as consolidated with Brown, Czaja and Shelton as intervening plaintiffs (District Court Docket No. H-76-102) and the second in the action brought by *Brown, Czaja* and *Shelton* (District Court Docket No. H-77-657).

Insofar as is pertinent, these judgments provided that "It is therefore accordingly ORDERED and ADJUDGED that Judgment enter and hereby does enter . . . that the Connecticut Board of Pardons furnish any member of the Plaintiff class [inmates currently serving sentences of life imprisonment at the Connecticut Correctional Institution, Somers and the Connecticut Correctional Institution, Enfield] a written statement of reasons and facts relied upon when such member of the Plaintiff class is denied a pardon by the Board." (See Appendix to Petitioners' Petition For A Writ Of Certiorari, pp. 26a-27a.)

In a *per curiam* opinion, the judgments were affirmed by the United States Court of Appeals for the Second Circuit. That Court's opinion is contained in the Appendix to Petitioners' Petition For A Writ of Certiorari at p. 18a, and is reported in 593 F.2d 165 (2d Cir. 1979).

The Board of Pardons then petitioned this Court for a Writ of Certiorari. This petition was granted by this Court on June

11, 1979 and this Court ordered that "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. (1979).

The Second Circuit requested the parties to file further briefs with that Court taking into consideration this Court's opinion in *Greenholtz*. The parties filed their respective briefs, and on March 20, 1980 the Second Circuit entered the following judgment which is the basis upon which this Petition for a Writ of Certiorari was filed:

> "Upon reconsideration, we affirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." See Appendix to Petitioners' Petition For A Writ of Certiorari, pp. 4a-5a, *Dumschat v. Board of Pardons*, 618 F.2d 216, 217.

The Connecticut Board of Pardons Petition for A Writ Of Certiorari was granted October 14, 1980.

SUMMARY OF ARGUMENT

Members of the plaintiff-respondent class do not have such a legitimate expectation of receiving pardon relief so as to give them a protectible right in the pardoning process.

Neither the statutory authority under which the Board of Pardons operates nor the Board's prior history in granting relief to lifers warrants the conclusion that a pardon is other than an act of clemency or mercy which is plenary in character subject only to the condition that this authority may not be exercised or withheld for constitutionally impermissable reasons. Such reasons are not even claimed in this case.

Requiring a written explanation of adverse decisions to lifers who have served some, as yet undetermined portion of their sentence, not only does not comport with the rationale of previous decisions of this Court calling for similar statements but would seem to encumber, for no good reason, those states where the authority to pardon is liberally used.

ARGUMENT

I. THE PLAINTIFFS DO NOT HAVE A PROTECTIBLE RIGHT TO A PARDON.

The authority of the Board of Pardons, insofar as is relevant to this action, is provided for in Section 18-26, Conn. Gen. Stat. In material part this statute provides as follows:

> "(a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence."

Upon reconsideration following remand from this Court, the Court of Appeals correctly concluded that ". . . Connecticut's pardons statute contains neither a presumption in favor of pardon nor a list of factors to be considered by the Board of Pardons. Instead, the statute grants the board *unfettered discretion* in the exercise of its power . . . The statute offers only the 'mere hope' of pardon; it does not create the legitimate expectation of freedom and therefore does not implicate due process" *Dumschat*, 618 F.2d 216, 219 (Emphasis added).

Further, both the Court of Appeals and the District Court recognized that the authority of the Board which is involved in this action, is the authority to reduce the minimum term of an inmate with the result being that the inmate's eligibility to be considered for release to the community by the Connecticut

Board of Parole is accelerated. See *Dumschat*, 618 F.2d 216, 217, note 1 and *Dumschat*, 432 F.Supp. 1310, 1312.

The Connecticut Board of Parole is a separate and distinct agency from the Board of Pardons.

With regard to this paroling authority the Connecticut Supreme Court has held that:

> "The sole statute concerning parole, §54-125, simply provides that an inmate who has served his minimum sentence 'may be allowed to go at large on parole in the discretion of the panel of the board of parole for the institution in which the person is confined.' There is no statutory requirement that the panel actually consider the eligibility of any inmate for parole, the statute does not vest an inmate with the right to demand parole, and there is no statutory provision which even permits an inmate to apply for parole." *Taylor v. Robinson*, 171 Conn. 691, 697, 372 A.2d 102 (1976).

The interpretation of this statute by "[t]he highest state court is the final authority on state law . . ." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177, 61 S.Ct. 176, 178 (1940).

Even though a lifer in Connecticut can have no statutorily based expectation of being released on parole or of even being considered eligible or applying for parole (*Taylor v. Robinson*, supra) and despite its conclusion that a lifer applies for a pardon to a board with "unfettered discretion", the Court of Appeals held that:

"Upon reconsideration, we afirm our earlier conclusions that (1) the consistent issuance of pardons to inmates serving life sentences in Connecticut has given them a protected 'liberty' interest in the pardons process, and (2) the due process rights

which attend this protected interest require that life inmates receive written explanations of adverse decisions by the Board of Pardons. We remand to the district court to determine at what point in an inmate's incarceration the likelihood of his receiving a pardon becomes sufficiently great to vest him with a protected 'liberty' interest and due process rights." *Dumschat*, 618, F.2d 216,217.

In so holding, the Court of Appeals accepted the contention of Connecticut's life inmates ". . . that they had a legitimate expectation of pardon and release - and due process rights in a pardon proceeding - by virtue of the regularity with which the Board of Pardons grants them relief." *Dumschat*, 618 F.2d at p. 219.

With regard to this "legitimate expectation" the Court noted that:

> "Though the statistical evidence provided below by state officials was not, as Judge Blumenfeld noted, 'as extensive as might be desired,' 432 F.Supp. at 1314, it was sufficient to establish that pardons are granted to Connecticut's life inmates with compelling frequency. Bernard Gates, then chairman of the Board of Parole, testified that more than 75 percent of Connecticut's 'lifers' have their eligibility for parole accelerated by the Board of Pardons. Ninety percent of these inmates are then granted parole within their first year of eligibility, and all are paroled after no more than a few years' wait." *Dumschat*, 618 F.2d 216, 219.

The Court of Appeals aslo noted that "In addition, the board grants immediate release to a number of other life inmates by cummuting their sentences to time served". *Dumschat*, 618, F.2d 219, 220.

The petitioners do not know where that observation is supported in the record. This was certainly not the finding of the District Court. The trial court found that "Although the board has the power to grant absolute pardons to inmates, that power is never employed. Instead, the board commutes an inmate's minimum sentence so as to render him eligible for parole at an earlier date. For persons sentenced to long imprisonment terms, particularly 'lifers' like plaintiff, accelerated release may often be a two-step process consisting of a commutation of their minimum sentence by the pardon board and then a parole from the board of parole." *Dumschat*, 432 F.Supp. 1310, 1312.

The conclusion that a "lifer" at some point in his sentence, acquires a "protectible liberty interest" is in conflict with this Court's opinion in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct., 2100, 60 L.Ed.2d 668 (1979).

In *Greenholtz* this Court held that:

"The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process we have inquired into the nature of the individual's claimed interest.

> '[T]o determine whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake . . . .' Board of Regents v. Roth, 408 U.S. 564, 570-571, 92 S.Ct. 2701, 2705-2706, 33 L.Ed.2d 548 (1972).

This has meant that to obtain a protectible right

> 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expecta-

> tion of it. He must, instead, have *a legitimate claim of entitlement to it.*' Id., at 577, 92 S.Ct. at 2709.

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.' Meachum v. Fano, 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1977)." (Emphasis added) 442 U.S. at page 7, 99 S.Ct., at pp. 2103-2104.

When one considers the vast discretion vested in the Board of Pardons, it is impossible to see how a "lifer" can acquire and hold to "a legitimate claim of entitlement" to a pardon.

The "lifers" expectation of obtaining a pardon is comparable to that of a prisoner in remaining at a particular institution. It is simply ". . . too ephemeral and insubstantial to trigger procedural due process proctections . . ." *Meachum v. Fano*, 427, U.S. 215, 228, 96 S.Ct., 2532, 2540, 49 L.Ed.2d, 451 (1976).

In basing its conclusions upon the history of the Board in granting pardons to "lifers" such as that history appears in the record, the Court of Appeals attached constitutional significance to percentages not deemed of such importance even by other panels of the Second Circuit.

In *Pugliese v. Nelson*, 617 F.2d 916, 923, (2d.Cir. 1980) another panel of the Court of Appeals considered prior decisions of that Circuit in light of *Greenholtz* and concluded that:

> "Equally important for our purposes is the Supreme Court's recent holding in Grenholtz, that a lawfully

> imprisoned convict's interest in the possibility of being released on parole prior to expiration of the term of his sentence does not entitle him to due process protection, absent the creation of a regulatory system giving him a right to claim parole release upon meeting certain conditions. Prior thereto we had taken the oppisite view in United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974), based mainly on the fact that the prisoner's interest in parole, though only an expectation, was emormous, representing as it does 'the difference between incarceration and conditional liberty' *and that most prisoners–more than 70%–were in fact customarily released on parole. In our view, that rendered the interest far from an ephemeral expectation. In light of Greenholtz, however, United States ex rel. Johnson no longer represents the law.* Booth v. Hammock, 605 F.2d 661 (2d Cir. 1979)." (Emphasis added)

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578, 92 S.Ct. 2701, 2710, 33 L.Ed.2d 548 this Court did not regard the suggestion "that most teachers hired on a year-to-year basis by Wisconsin State University—Oshkosh are, in fact, rehired" to be of sufficient import to infer the presence of "a legitimate claim of entitlement" to be rehired. (See Roth, supra. footnote 6.)

With regard to this Court's opinion in *Greenholtz*, the Second Circuit held that in basing their conclusion on the Board's history "We find nothing in Greenholtz that precludes this holding." 618 F.2d at p. 220. In so doing, the Second Circuit rejected the claim of the petitioners that Greenholtz does preclude such a holding. (footnote 16)

In *Greenholtz*, similar statistics were available to this Court, by virtue of the certified record, for the District Court

had included in its decision a table showing numbers of inmates eligible for discretionary parole and the number who obtained it. *Inmates of Nebraska Penal and Correctional Complex v. Greenholtz*, 436 F.Supp. 430 (1976) table at 439.

Simple calculation shows that among Caucasians, Blacks and Mexicans eligible for discretionary parole approximately sixty percent of each group achieved release. Thus, if local Board practice which resulted in a statistical showing that it was more likely than not, that one would achieve discretionary parole were a sufficient basis for a protected liberty interest then this Court would have so found in *Greenholtz*.

Instead, this Court found "That the State holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Greenholtz*, supra, 442 U.S. 11, 99 S.Ct., 2105. (Court's emphasis).

That Connecticut may grant a slightly higher percentage of reduced terms to lifers through its pardons process than Nebraska does discretionary paroles through its parole process is not constitutionally significant, There is no basis upon which to draw a constitutional line at seventy-five percent.

In any event, as "Judge Henry Friendly cogently noted . . . '[T]here is a human difference between losing what one has and not getting what one wants.' Friendly, 'Some Kind of Hearing', 123 U.Pa.L.Rev. 1267, 1296, (1975)." *Greenholtz*, supra, 442 U.S. 10, 99 S.Ct., 2105.

The life inmate in Connecticut who is denied a reduction in his minimum term is not in the situation of losing what he has but rather in the situation of not getting what he wants.

Even the Court's rationale for requiring "written explanations of adverse decisions" seems to contradict its conclusion with regard to a "legitimate expectation."

This rationale is that "The need to give reasons encourages fair and thoughtful deliberations by the board, thus protecting against arbitrary and constitutionally impermissable decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel.[9] [Thirteen different people sat on the five person board between November 1973 and November 1976.] Finally, it helps inmates to correct misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief." *Dumschat*, supra, 618 F.2d, 221.

It is respectfully claimed that it is simply inconsistent to say that a lifer, at some point in his sentence, acquires a constitutionally protected legitimate expectation of relief from the Board because of the Board's history in dealing with lifers and at the same time, justify the constitutional relief given on the grounds that this relief "encourages fair and thoughtful deliberations . . ." and that it "protect[s] against arbitrary and constitutionally impermissable decisions" and that it "promotes consistancy" and that it "corrects misunderstandings."

Putting the Board's statutorily "unfettered discretion" aside, since the Court feels that the administrative process itself is subject to such defects, and in this regard the petitioners do not concede this to be the case, then one has to wonder how a lifer could have any expectation of favorable action from a Board whose history of prior decisions upon which that expectation is premised, has been and presumably will continue to be so influenced by chance.

II. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS ALSO IN CONFLICT WITH THIS COURT'S OPINION IN *SCHICK V. REED.*

This conclusion of the Second Circuit of a "liberty interest" is contrary to the opinion of this Court in *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).

In *Schick* this Court dealt with the authority of the President to ". . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Case of Impeachment." Article 2, Section 2, Clause 1, United States Constitution.

In *Schick* this Court characterized one who seeks a pardon as a ". . . person who *petitions for mercy* . . . " *Schick*, supra, 419 U.S. 267, 95 S.Ct. 385 (emphasis added).

In *Schick*, this Court considered the origins of the President's pardoning power and observed the following:

> "At the time of the drafting and adoption of our Constitution it was considered elementary that the prerogative of the English crown could be exercised upon conditions:
>
> 'It seems agreed, That the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.' 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)." *Schick*, supra, 419 U.S. 261, 95 S.Ct. 382.

This Court then went on to hold that:

> "The history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice." *Schick*, supra, 419 U.S. 262, 95 S.Ct. 383.

This Court further held that "The plain purpose of the broad power conferred by Section 2, cl. 1, was to allow *plenary* authority in the President to *'forgive'* the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with *conditions which are in themselves constitutionally unobjectionable.*" *Schick*, supra, 419 U.S. 266, 95 S.Ct. 385. (Emphasis added).

Thus, since the pardoning power is "plenary" subject only to the attachment of conditions which are constitutionally unobjectionable then the denial of a pardon must be "plentary" subject only to the condition that a denial may not be based upon constitutionally impermissable reasons. There is no claim in this case that the denial was based upon constitutionally impermissable reasons.

If the Connecticut Board of Pardons were required to state reasons for denying relief, then it would seem inescapable that the President of the United States in denying pardon relief would similarly be required to state his reasons. Such a conclusion seems ridiculous on its face.

So long as the Board does not deny a pardon for a constitionally impermissable reason there is no statement which it could give which would serve any purpose. It is impossible to conceive of a situation wherein any court absent the denial of a pardon because of the applicant's race, religion, etc. would overrule a Pardon Board decision to deny clemency.

III. THE PLAINTIFFS DO NOT HAVE A RIGHT TO WRITTEN EXPLANATIONS OF ADVERSE DECISIONS.

The Court of Appeals concluded, in part that "Nothing in *Greenholtz* requires us to overrule Judge Blumenfeld's determination regarding the requirements of due process in this case. In fact, dicta in *Greenholtz* suggests support for Judge Blumenfeld's conclusion", *Dumschat*, 618 F.2d at p. 221.

The Court of Appeals then quoted from that portion of this Court's opinion in *Greenholtz* which stated that "[W]hen parole is denied [the board] informs the inmate in what respects he falls short of qualifying for parole; *this affords the process that is due under these circumstances*." *Dumschat*, 618 F.2d at p. 222, emphasis supplied by the Court of Appeals.

This statement from *Greenholtz*, of course, must be read in the context of this Court's acceptance of the "view that the expectancy of release provided in [the Nebraska statute] is entitled to some measure of protection." *Greenholtz*, supra, 411 U.S. at p. 12, 99 S.Ct. at p. 2106.

This "expectancy of release" is precisely what is absent from Sec. 18-26, Connecticut General Statutes and this absence was noted by the Court of Appeals as has been discussed above. Unlike the Nebraska statute in *Greenholtz*, by no stretch of the imagination can the Connecticut Statute be construed as providing that the inmate "shall" obtain release "unless" some designated reason is found.

The Second Circuit has itself recognized the pivotal role which the "uniqueness" of the Nebraska statute played in the majority opinion in *Greenholtz*. See *Boothe v. Hammock*, 605 F.2d 661, 663-664 (1979).

There is simply no basis either in statutory provisions or administrative practice to find a "legitimate expectation" that

a "lifer" in Connecticut "shall" obtain pardon relief unless some disqualifying condition arises.

Nor is this case similar to other cases wherein this Court ordered a written explanation from an administrative agency. See *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d. 484 (1972) wherein such statement was predicated upon the fact that a parolee enjoys numerous benefits and "has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions [and] [i]n many cases . . . faces lengthy incarceration if his parole is revoked." *Morrissey*, supra, 404 U.S. p. 482, 92 S.Ct. 2601 and *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 11 L.Ed.2d 935, wherein such statement was based upon the fact that "the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior", *Wolff*, supra. 418 U.S. p. 557, 94 S.Ct. 2975.

Even if the Connecticut Board of Pardons may be liberal in the exercise of its authority, its record, such as it appears, can hardly be interpreted as conveying the message to anyone that he "shall" be pardoned or that he can enjoy the certainty of this act of clemency coming to him unless he disqualifies himself by his conduct.

In fact, if one regards the pardoning process as a socially useful instrument then it is difficult to understand the burdening of this process only because of its liberal use.

Certainly the rationale of the Court of Appeals, turning as it does on the attitudes, philosophies and personalities of board members would result in the applicability of due process differing from state to state and even in the same state as membership changes.

This rationale would seem to require the conclusion that a written explanation is *not* required where prior history showed infrequent use of this authority.

CONCLUSION

The judgment of the Court of Appeals should be reversed and action remanded to the District Court for the entry of judgment for the petitioners-defendants.

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CERTIFICATION

This is to certify that on this 28th day of November, 1980, three copies of Brief For Petitioners and Joint Appendix were mailed, postage prepaid, to Stephen Wizner, 127 Wall Street, New Haven, Connecticut, counsel for the Respondents.

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No. 79-1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONNECTICUT BOARD OF PARDONS, ET AL., *Petitioners,*

v.

DAVID DUMSCHAT, *Respondent;*

JAMES BROWN, STANLEY CZAJA AND
JAMES SHELTON, *Intervening Respondents,*

CONNECTICUT BOARD OF PARDONS, ET AL., *Petitioners,*

v.

JAMES BROWN, STANLEY CZAJA AND
JAMES SHELTON, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the long-standing, consistent practice of the Connecticut Board of Pardons of granting sentence commutations to almost all prisoners serving life sentences has created a legitimate claim of entitlement to those commutations which requires the Board to provide reasons when it denies commutations petitions.

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

Respondents adopt the statement of Petitioners.

JURISDICTION

Respondents adopt the statement of Petitioners.

STATEMENT OF THE CASE*

Respondents represent a class of approximately thirty-five inmates sentenced to terms of life imprisonment prior to the revision of the Connecticut Penal Code in 1971.[1] For these inmates, release from prison prior to the expiration of their effective minimum terms[2] occurs through a two step process. First, they are made eligible

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* Respondents adopt only so much of Petitioner's Statement of the Case as recites the proceedings below.

[1] Until 1971, Conn. Gen. Stat. §54-121 provided that "[w]hen any person is sentenced to the state prison, otherwise than for life or in connection with a sentence of execution for a capital offense, the court imposing the sentence shall establish a maximum and minimum term for which such convict may be held in such a prison." Under Connecticut law, only prisoners who have served their minimum terms of imprisonment are eligible for parole. Conn. Gen. Stat. §54-125. However, persons sentenced to life incarceration, like Respondents, have no minimum terms, and become eligible for parole only after having served twenty to twenty-five years in prison, depending upon the good time which they have earned. Conn. Gen. Stat. §54-125.

In 1971, the Connecticut legislature enacted a new statute, Conn. Gen. Stat. §53a-35, which required sentencing judges to affix minimum terms of from ten to twenty-five years to life sentence. Thus, if Respondents had been sentenced under the new penal code, they might already have become parole eligible.

[2] Prisoners sentenced to life imprisonment prior to the revision of the penal code have no minimum terms. *See* note 1, *supra.* However, since they can become eligible for parole after twenty to twenty-five years, this period serves as an effective minimum term as far as parole is concerned.

for parole when their sentences are commuted by the Petitioner, the Connecticut Board of Pardons[3] (hereinafter "State Board"). Second, the Board of Parole determines whether they should be released on parole.

Of Connecticut inmates serving life terms under the former statute, between seventy-five percent and ninety percent have their eligibility for parole accelerated by the State Board. (J.A. at 31, 33).* Such sentence commutation is tantamount to release because ninety percent of these lifers are paroled within a year after commutation,

---

[3] The Connecticut Board of Pardons is a state agency established pursuant to §18-24a of the Connecticut General Statutes. This statute provides that the Board consist of five members: two attorneys, one person skilled in the social sciences, one physician, and a Justice of the Connecticut Supreme Court. Section 18-26 confers upon the Board the power to grant "conditioned or absolute" pardons. The form of relief most frequently granted is the commutation of an inmate's minimum sentence to time served and the consequent acceleration of his or her eligibility for parole. (Joint Appendix at 53, 59, 74-76). The Board almost never grants an absolute pardon to an inmate. (Joint Appendix at 75). Absolute pardons are reserved for ex-prisoners who wish to erase a long-standing conviction. (Joint Appendix at 68, 69). Such pardons are not at issue in the instant case.

* Citations to "J.A." are to the Joint Appendix filed with this Court. It should be noted that there is an error in the Index of the Joint Appendix. The transcript listed as "Partial Transcript of Hearing of March 9, 1978" is actually a partial transcript of the November 18, 1976 hearing. The transcript listed as "Parial [*Sic*] Transcript of Hearing of November 18, 1976" is actually a partial transcript of the March 9, 1978 hearing.

at their first appearance before the Connecticut Board of Parole. (J.A. at 33, 39). Virtually all the remaining ten percent are paroled within three more years. (J.A. at 40). As a result members of Respondent class expect to be released prior to the expiration of their effective minimum terms.[4]

---

[4] The decision of the Second Circuit Court of Appeals, now before this Court for revfew, remanded this case to the District Court for further findings concerning the pattern and practice of the Connecticut Board of Pardons. While Respondents urge this Court to affirm the decision of the Court of Appeals, they also submit that this Court should dismiss the Writ of Certiorari as improvidently granted. *See N.A.A.C.P.* v. *Overstreet*, 384 U.S. 118 (1966). In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) this Court stated:

> As has been may times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. . . . And, except in extraordinary cases, the writ is not issued until final decree. . . . The decree that was sought to be reviewed by certiorari at complainant's insistence was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application. . . .

See also Brotherhood of Locomotive Firemen & Engineermen v. *Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967). ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."

Certiorari might also be dismissed on the ground that this case does not present an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rules 17.1. This case is extremely narrow in scope, resting on the peculiar practices and procedures of the Connecticut Board of Pardons. Furthermore, as has been noted above, it involves a small class of inmates sentenced under a statute which has been repealed.

The State Board shares this expectation. The Board's members are aware that their decision to reduce a sentence is equivalent to a decision to grant parole.[5] Accordingly, the Board has established elaborate adversary procedures in an attempt to ensure fair and reliable decision-making. These procedures include the right to be represented by an attorney (*Record*, Transcript of November 18, 1976 at 39-40), the right to inspect Pardon Board files (*Id.* at 40) the right to challenge inaccuracies in the files (*Id.* at 40), the right to present witnesses (J.A. at 67), and the right to submit documentary evidence (J.A. at 68). The State's Attorney may appear at these hearings to oppose the granting of relief (J.A. at 67).

The Board meets four times a year to consider the petitions submitted by inmates at Connecticut state prisons (J.A. at 81). At each sitting, the Board hears and

---

[5] Richard Lublin, former Chairman of the State Board, responded to the following questions asked by District Judge M. Joseph Blumenfeld:

> Q. You did say that you're aware of the fact that parole is almost automatic following the granting of a pardon?
>
> A. That is correct.
>
> Q. And does that weigh with you, and how, in your decision-making? Or do you have a feeling that you're in no way passing the buck, but you're just passing him through the Parole Board?
>
> A. Yes. We feel we're opening the door pretty much and letting him go. . . .
>
> (*Record*, Transcript of November 18, 1976 at 42).

rules on approximately sixty petitions (*Record*, Transcript of November 18, 1976 at 32). After hearing the inmates' petitions, the Board retires and meets in closed session. The Secretary of the Board reads aloud the names of all the inmates whose cases have been heard, pausing after each name. If none of the Board members speaks, no vote is taken and the application is denied. If a member wishes to address the merits of a petition in greater depth, he or she may initiate discussion, which would then be followed by a vote. (*Id.* at 33). Four affirmative votes are required for the granting of relief. Conn. Gen. Stat. §18-27.

A prisoner is informed only of the outcome in his or her case. (*Record, Carrona* Transcript at 15).* Despite the procedural protections afforded during the hearing, the Board gives no reasons for its decisions. The only explanation prisoners whose sentences have not been commuted receive from the Board is a slip of paper stating: "The Board has granted you a denied." [*Sic*] (*Id.*)

Respondents in this case are the few "lifers" who have not been released, for they never reached the second step of Connecticut's parole system. Although Respondents Brown and Czaja had unblemished institutional records and only one prior conviction between them, some "lifers" made eligible for parole by the State Board had committed disciplinary infractions while im-

* Citations to "*Carrona* Transcript" are to the Transcript of Hearing in *Caronna* v. *Manson et al.* (D. Conn., Civil No. H-74-377) on September 25, 1975, which was incorporated in the Record of this case by stipulation.

prisoned and had lengthy prior records. Respondents' crimes[6] were no more serious than those committed by other prisoners whose sentences were commuted.[7] Nevertheless, Respondents were denied sentence commutations by the State Board. They still do not know why.

Respondent James Brown was sentenced in 1969 to life in prison for killing a woman friend. (*Record*, Pardon Board File No. 23121, "Connecticut State Prison Admission Summary"). He had no prior criminal record. (*Record*, Pardon Board File No. 23121, "F.B.I. Record"). He had no disciplinary citations during his eight year confinement. (J.A. at 12, 28). He had been employed in the shipping and receiving department at the Connecticut Correctional Institution at Somers. (J.A. at 12, 28). Since 1975, Brown had participated continuously in the prison's furlough program. (J.A. at 12, 28). He had attended classes in order to obtain an elementary school education, and learned woodworking in the hobby shop. (J.A. at 12, 28).

---

[6] Czaja was convicted of second degree murder. Brown originally was convicted of second degree murder, but his conviction was overturned by the Connecticut Supreme Court. *State* v. *Brown*, 157 Conn. 492 (1969). He was then tried and convicted of first degree murder.

[7] At the time Respondents were sentenced, life sentences could be imposed in Connecticut upon persons convicted of first and second degree murder, or who caused the death of others by wilfully tampering with railroads, or who endangered the life of others by wilful arson, or who "of malice aforethought, and by lying in wait," put out "the eyes of another, so that the person is thereby made blind," or cut out "the tongue . . . or . . . all or any of the privy members of another." Conn. Gen. Stat. §§53-10, 11.

Similarly, Respondent Stanley Czaja had had no disciplinary citations. (J.A. at 14, 28). By 1977, when Respondents intervened in this case, fifteen years had passed since Czaja had been sentenced for the drunken slaying of a state trooper who had attempted to break up a family argument. (*Record*, Pardon Board File No. 20319, " Connecticut State Prison Admission Summary"). Like Brown, he had been a model prisoner, participating continuously in the institutional furlough program since 1972. (J.A. at 14, 28). Czaja had been employed at the institution in a variety of jobs, including prison librarian (J.A. at 14, 28). Czaja had had only one conviction, for petty larceny prior to his shooting of the trooper. (*Record*, Pardon Board File No. 20319, "Criminal History").

The records of lifers whose sentences were commuted contrast sharply with those of Respondents. For example, James Carrona, who had killed his estranged wife, had had seventeen citations for misconduct in prison, including "fighting, disobeying a direct order, threatening a staff member, violation of inspection." (*Record, Carrona* Transcript at 43). He had an equivocal psychiatric report in his record. (*Record, Carrona* Transcript at 50). David Dumschat, who filed the original action in this case and whose sentence was commuted by the State Board to time served on the very day that the District Court ordered the Board to tell him why his commutation petition had been denied, had had three disciplinary citations, including one for "handling contraband" and another for intoxication. (*Record*, Pardon

Board File No. 21057, p. 2). His crime had involved the shooting of two people — his former wife and the doctor for whom she worked. (*Record*, Pardon Board File No. 21057, "Summary of Offense", p.2). Mr. Lublin, testifying seven months before the Board commuted Mr. Dumschat's sentence, said of Mr. Dumschat:

> We're cognizant of the fact that almost everybody who gets turned over by the Board of Pardons to the Parole Board is released. And in our opinion he would be a threat to society.

Record, Transcript of November 18, 1976, p. 36.

James Shelton, the third Respondent intervenor, eventually had his sentence commuted on October 23, 1978. (Petitioner's Brief at 5). Shelton had served approximately nine years of the life sentence he received for the murder of a friend's husband. (*Record*, Pardon Board File No. 23068, Report of Edward A. Murphy, Probation Officer, p. 1). Unlike Dumschat and Carrona, there were at least three letters in his file recommending release. (*Record*, Pardon Board File No. 23068, Letters of Ernest Begin, George N. Pechka and George E. Johnson). Shelton, however, also had a criminal history which included forty-three convictions. (*Record*, Pardon Board File No. 23068, Report of Edward A. Murphy, Probation Officer, pp. 3-5). From 1945 to his incarceration in 1964, he had been convicted of at least one offense in every year except 1952. (*Id.* pp. 3-5). Paul Mc-

Quillan, Chairman of the Board of Pardons, testified in this action about Shelton on March 9, 1978 as follows:

> And I think to today he doesn't appreciate perhaps, the value between human life and the material things, and it's based on no educational background, a sharecropper coming off a farm, and I don't think that he had that evaluation. (J.A. at 52).

Nonetheless, less than a year later, James Shelton's sentence was commuted by the State Board.

The exemplary records of Respondents Brown and Czaja distinguish them from the criminal histories and disciplinary citations accumulated by Carrona, Dumschat and Shelton. Carrona, Dumschat and Shelton all received sentence commutations from the State Board. All Brown and Czaja received were slips of paper stating: "The Board has granted you a denied."

SUMMARY OF ARGUMENT

The record reflects an "almost invariable practice" of the Connecticut Board of Pardons of accelerating the parole eligibility of most Connecticut prisoners serving life terms. *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979). Such parole acceleration by the State Board is tantamount to a parole release decision. The long-standing, consistent policy and practice of the State Board results in "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms . . ." *Dumschat* v. *Board of Pardons (II)*, 618 F.2d 216, 220 (2d Cir. 1980).

The State Board's practices generate a legitimate expectation on the part of life inmates that meritorious sentence commutation petitions will be fairly considered and granted. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1 (1979).

The State Board shares this expectation. It consistently commutes the sentences of life inmates in order to induce them to maintain good behavior and provide services to the state while incarcerated. The State has thus engendered the inmates' expectation that meritorious commutation petitions will be fairly considered and granted, and has benefited from that mutual understanding.

The settled practice of the State Board establishes Connecticut Law concerning the entitlement of life inmates to sentence commutations. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 369; *Hughes* v. *Superior Court of California,* 339 U.S. 460, 466-7 (1950); *Konigsberg* v. *State Bar of California*, 366 U.S. 497 (1961). This settled practice has generated mutually explicit understanding between the Board and life inmates which confers upon those inmates an entitlement to sentence commutations. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). *Perry* v. *Sindermann*, 408 U.S. 593 (1972). *Cf. Leis* v. *Flynt*, 439 U.S. 438 (1979). The Constitution requires the State Board to provide reasons when it denies the sentence commutation petitions of Connecticut Prisoners serving life terms, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). In light of the insignificant burden which a reasons requirement

would impose on the State Board, the important benefits that would flow from the provision of reasons, and the vital interest at stake in the commutation proceeding, a statement of reasons is the minimum process due a life inmate whose commutation petition is denied.

ARGUMENT

I. The Long-Standing, Consistent Policy And Practice Of The Connecticut Board Of Pardons Of Granting Sentence Commutations To Almost All Inmates Serving Life Sentences Has Created A Legitimate Claim Of Entitlement To These Commutations.

The Court of Appeals, after carefully reviewing the District Court's findings of fact, concluded that "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms gives them a constitutionally protected liberty interest in pardon proceedings." *Dumschat* v. *Board of Pardons (II)*, 618 F.2d 216, 220 (2d Cir. (1980). This liberty interest is created by the Board's "almost invariable practice" of reducing the minimum sentences of life inmates. *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979).

Thus, while the sentence commutation statute under which the Board operates is couched in discretionary terms,

> Statutory or constitutional language . . . is not the only ground upon which a legitimate expectation of liberty or property may rest. Such an expecta-

> tion, with attendant due process rights, may also be based on regulations, policies, understandings, contractual arrangements or institutional practices.

618 F.2d at 219.

Law is expressed as much by the practices and policies of state officials as it is by the language of state statutes. In *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362 (1946). This Court held that state practice can establish what state law is, even where such practice differs from what is contained in state statutes. Justice Frankfurter, writing for the Court, reasoned:

> It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often toughter and truer law than the dead words of the written text.

310 U.S. at 369.

In *Hughes* v. *Superior Court of California for Contra Costa County*, 339 U.S. 460, 466-7 (1950), the *Nashville* doctrine was followed in a due process case which held that the federal courts could look to the acts of a state judiciary, as well as those of the legislature, to determine what state policy was and whether its application violated the Constitution. The same rationale was

held to govern judicial rules controlling state bar admissions in *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 45 (1961), and was applied in *Poe* v. *Ullman*, 367 U.S. 497 (1961), to declare a state statute effectively repealed by the executive's practice of non-enforcement. In *Poe* this Court was presented with a challenge to Connecticut statutes that prohibited the use and the giving of medical advice regarding the use of contraceptives. Applying Justice Frankfurter's *Nashville* precept, this Court held that no Article III controversy existed because these statutes had fallen into desuetude.

> The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy. . ." — or not carrying it out — "are often tougher and truer law than the dead words of the written text." *Nashville C. & St. L. Ry. Co.* v. *Browning*, 310 U.S. 362, 369.

367 U.S. at 502.

The type of "deeply embedded traditional [way] of carrying out state policy" described by Justice Frankfurter in *Nashville*, and recognized by this Court in numerous subsequent decisions, is present in this case. It is a practice which has created a legitimate expectation on the part of life inmates in Connecticut prisons that they will receive sentence commutations from the Board which will make them eligible for release prior to completion of their twenty-five year minimum terms.

Both the District Court and the Court of Appeals found convincing evidence of this practice in the testimony of Bernard Gates, Chairman of the Connecticut Parole Board, concerning his personal knowledge of the practices of the Connecticut Board of Pardons over a thirty-five year period. Based on Mr. Gates's testimony the District Court found that

> at least seventy-five percent of all lifers received some favorable action from the pardon board prior to completing their minimum sentences.

432 F. Supp. at 1314. In fact, the State Board may commute the minimum sentences of as many as "85 or 90 percent of the [life] inmates" who appear before it. 618 F.2d at 220 n.5.

Mr. Gates testified that during his nine years as Parole Board Chairman only three of the many lifers who had appeared before the Parole Board had served as much as twenty years. *Id.* It was also Mr. Gates who emphasized the link between sentence commutation and parole. He testified that approximately ninety percent of the life inmates whose eligibility for parole had been accelerated by the Board of Pardons actually were paroled within their first year of eligibility. (J.A. at 33.) Virtually all of the remaining inmates were paroled within a few years of obtaining parole-eligibile status from the Pardons Board. (J.A. at 39-40.)

In light of Mr. Gates's testimony, Petitioners' claim that the Connecticut Board of Pardons is a insular body divorced from the parole process is untenable. (Peti-

tioners' Brief at 11.) Richard Lublin, former Chairman of the State Board, conceded that the members of the Board realize the true nature of its function.

> We're cognizant of the fact that almost everyone who gets turned over by the Board of Pardons to the Parole Board is released.

Record, Transcript of November 18, 1976 at 40.

The long-standing and consistent practice of the State Board has created the same expectation of parole as was generated by a statute in *Greenholtz* v. *Nebraska Penal Inmates*, 442 US. 1 (1979).[8] This Court has consistently looked to the practices of state agencies in determining whether a legitimate expectation entitled to due process protection has been created by the State. In *Board of Regents of State Colleges* v. *Roth*, 408 U.S 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Court emphasized that

> . . ."property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." [Citations omitted].

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[8] Petitioners claim that the Second Circuit's decision is in conflict with this Court's opinion in *Greenholtz*. However, the Second Circuit's acceptance and careful consideration of *Greenholtz* is evidenced not only in its opinion in this case, but also by its holding in *Boothe* v. *Hammock*, 605 F.2d 661 (1979). The opinion in *Boothe*, circulated to all active judges of the Circuit before filing, *see* 605 F.2d at 665 n.5, overruled several previous Second Circuit decisions which the Court deemed inconsistent with *Greenholtz*.

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

408 U.S. at 601.[9]

The Court emphasized in *Perry* that these "mutually explicit understandings" need not have a basis in a written document to create a "legitimate claim of entitlement." "Mutually explicit understanding" may be based on "the policies and practices of [an] institution." 408 U.S. at 603. The Court analogized the circumstances which generate such understandings to "implied contracts," *Id.* at 602, and to "unwritten 'common law.' " *Id.*

In this case the District Court and the Court of Appeals found that the State Board has created an unwritten common law of sentence commutation and parole acceleration for Connecticut life inmates. Through its consistent policy and practice of reducing the minimum terms of life inmates, the State Board has encouraged these prisoners to rehabilitate themselves, to maintain exemplary institutional conduct records, and to expect that meritorious commutation petitions will be fairly considered and granted.

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[9] It should be noted that this Court has never recognized a difference between liberty and property interests as far as the creation of legitimate claims of entitlement are concerned. In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 542 (1972), the Court held that it had "never adopted the distinction between personal liberty and proprietary rights" with respect to jurisdiction conferred on the district courts by 28 U.S.C. §1343, one of the provisions enacted to enforce the Fourteenth Amendment.

The expectation of sentence commutation is not unilateral. By generating in inmates a well-founded belief that they will be released, the State expects that "lifers" will control their institutional behavior and avoid activities which would reduce the likelihood of commutation. In the words of Paul McQuillan, Chairman of the Pardons Board:

> . . . [w]e are acutely aware of the fact that within that prison institution every bit of our conduct is closely watched, and if there is an indication of any unfairness it causes a lot of difficulty; and the warden is, of course, very concerned about that sort of thing.

J.A. at 55. In effect, there is an unspoken understanding between the State Board and inmates. The terms are simple: If the inmate cooperates with the State, the State will exercise its parole power on the inmate's behalf. Both the State and the inmate recognize those terms. Each expects the other to abide by them.

This mutual understanding is extremely important to the State. If a prisoner conforms to institutional policies, and volunteers his services to the State when he is not legally bound to do so, the State benefits by diminished tensions at the prison and the savings in manpower hours and other resources which inmate cooperation affords. In addition, an atmosphere of cooperation is thereby engendered at the state's penal institutions which makes it easier for the State to attract and retain competent employees.

In this case Respondents met the State's expectation of inmate cooperation. Respondents Brown and Czaja compiled excellent disciplinary records. They also provided the State with a wide variety of services. The State expected and benefitted from each Respondent's compliance.

This case, therefore, differs significantly from *Leis* v. *Flynt*, 439 U.S. 438 (1979), in which this Court was asked to hold that "a constitutional right can be created — as if by estoppel — merely because a wholly and expressly discretionary state privilege has been granted in the past." 439 U.S. at 444, n.5. The issue in that case was whether the past practice of Ohio judges of permitting out-of-state lawyers to appear *pro hac vice* in Ohio courts had conferred upon all out-of-state lawyers a constitutional right to represent clients in Ohio courts.

Unlike the situation in *Leis,* in this case Connecticut life inmates and the State Board have a "*mutual* understanding," 439 U.S. at 443 (emphasis in original), that meritorious commutation petitions will be fairly considered and granted. This mutual understanding is reflected not only in the longstanding, consistent policy and practice of the State Board in granting sentence commutations to almost all life inmates, but also in the important benefits obtained by the State in terms of inmate cooperation, good behavior, and labor induced by inmate expectation of early release. The State's expectation is further evidenced by the elaborate procedures established by the State Board for the hearing of inmate petitions.

Connecticut's sentence commutation procedure includes notice, access to files, the right to an attorney and the right to present witnesses and submit letters. (*Record*, Transcript of November 18, 1976, at 39-40; J.A. at 67-68.) The State's Attorney from the county where the inmate was convicted may appear and be heard in opposition to the petition for sentence commutation. (J.A. at 67). While there are no written criteria for granting sentence commutations, there are explicit policies for the process which is to be followed. The Board has maintained published rules since its inception in 1883. *Dumschat* v. *Board of Pardons*, 432 F. Supp. at 1312, n.7.

Although by affording some procedural safeguards the State does not create a right to those or additional procedures, *Cofone* v. *Manson*, 594 F.2d 934, 938-9 (2d Cir. 1979), the use of judicial procedures does reflect an effort by the Board to achieve accurate decision-making, and an expression of the Board's intention to grant meritorious commutation petitions. The adoption of judicial mechanisms in the sentence commutation process creates an expectation that meritorious commutation petitions will be fairly heard and granted. The presence of a Justice of the Connecticut Supreme Court on the State Board reinforces this conclusion.

The State's apparent aim in developing and implementing the procedures of the Board was to assure Respondents that the Board would follow a reliable procedure for determing whether facts existed which would justify sentence commutations and which would provide

the inmates an opportunity to present such facts. Thus, the State Board's adoption of these procedures buttresses the conclusion that the Board and Respondents share a mutual understanding that the Respondents are entitled to sentence commutations when they present meritorious petitions.

By commuting the sentences of almost all lifers in Connecticut prisons, and by establishing elaborate procedures for commutation hearings, the State Board has created a mutually explicit understanding in which State and inmate share expectations of good behavior by the inmate and early release by the State. After having heard all the evidence in this case, the District Judge held:

> Where, as in Connecticut, the State has set up a statutory process for granting commutations of sentence, established an administrative body to hear petitions and implement that statute, and granted such relief to at least three-quarters of the long-term inmates appearing before it, I think it clear that the denial of a pardon to such inmates implicates a liberty interest requiring due process protections.

432 F. Supp. at 1314.

By its long-standing, consistent policies and practices Connecticut has created its own "institutional common law," *see Perry* v. *Sindermann*, 408 U.S. at 602-603, that Connecticut prisoners serving life sentences will not be denied sentence commutations without due process of law.

II. The Connecticut Board Of Pardons Is Required To Provide Reasons When It Denies Sentence Commutation Petitions Of Prisoners Serving Life Terms.

James Brown and Stanley Czaja have maintained exemplary institutional conduct records during their long periods of incarceration. Neither has received a single disciplinary citation. Both have performed a variety of useful services for the State. Both have been permitted on a regular basis to leave the institution on furloughs, and have participated in rehabilitative programs. James Brown has no other criminal convictions. Stanley Czaja has one other minor conviction for petty larceny. Brown has been incarcerated for thirteen years, Czaja for eighteen years. Both Brown and Czaja have petitioned the Connecticut Board of Pardons repeatedly for sentence commutations. All of their petitions have been denied without explanation.

If the State Board has reasons for denying Brown and Czaja sentence commutations, those reasons are not apparent. Other prisoners with worse institutional records and criminal histories have received commutations from the Board. James Carrona had seventeen disciplinary citations and an equivocal psychiatric report in his file. David Dumschat had three disciplinary citations. James Shelton had a criminal record of forty-three convictions. All received sentence commutations.

In the face of such decisions the need for reasoned explanations is apparent.

A state agency which has established an "almost invariable practice," *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979), of granting sentence commutations to life prisoners, and which has granted commutations to those with worse records than inmates such as Brown and Czaja, should, at a minimum, be required to explain the reasons for such denials.

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), this Court established the criteria for determining what process is due once a constitutionally protected entitlement has been found to exist.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

In this case "the private interest that will be affected" by official action is enormous. The State Board's decision to grant or deny a sentence reduction effectively determines whether an inmate will be freed before the expiration of his or her minimum term. In nine out of ten cases, positive action by the Board of Pardons results in a precise determination of the date of release, subject only to the minor variations which arise from the fact that the Parole Board does not meet in

continuous session. In the remaining ten percent of cases, the Pardon Board's decision does not set a date for release, but it effectively ensures that release will be attained within, at most, four years. (J.A. at 40.)

The granting of a commutation petition may reduce a life prisoner's term of incarceration by many years. The few members of the class of life inmates whose sentences are not commuted will spend at least twenty years behind bars. Because a denial by the Board precludes early release, and commutation is tantamount to setting a date for it, the decision of the State Board is crucial to the inmate serving a life term and affects a valuable liberty interest.

The second part of the *Mathews* equation is the risk of erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional safeguards. The State Board's existing procedures are inadequate to assure inmates fair, reasoned decisions on their commutation applications. Under the present system the State Board listens to case after case in uninterrupted succession. At the end of a session the Board decides the cases it has heard. A particular case is discussed only if one of the Board members wishes to make a comment about that case. If no member comments, the petition is denied.

Under this system it is impossible to know that the Board members have based their decisions on rational grounds, or on any grounds at all or that their collective

silence reflects anything more than fatigue.[10] A Board member does not know why the other members have responded with silence to a petition, and may not even know why he himself has. Not even the Board members themselves can be sure that their decision to deny an inmate relief is not based on constitutionally impermissible grounds, such as race or religion. Petitioners concede that decisions on such grounds are improper. (Petitioner's Brief at 19.) The safeguards provided at the hearing stage of the process are rendered meaningless by the total absence of any protection at the decision-making stage.

The safeguard which respondents seek to add, and which both lower courts found necessary, is the provision of a statement of reasons when a commutation is denied.[11]

[10] Former Chairman of the Pardons Board, Richard Lublin, described the process: "It's very emotionally exhausting to go over 40, 50 cases a day." *Record, Carrona* Transcript at 50.

[11] Professor Kenneth Davis commented on the old federal parole system which did not require reasons when parole was denied

> The failure to state reasons has additional consequences. Even the most flagrant abuse of discretion is likely to go uncorrected. If a board member is in such a hurry to get to his golf game that he votes in sixteen cases without looking inside the files, no one under the board's system can ever know the difference, even though the personal liberty of sixteen men may be at stake. How could a board member have less incentive to avoid prejudice or undue haste than by a system in which his decision can never be reviewed and in which no one, not even his colleagues, can ever know why he voted as he did? Even complete irrationality of a vote can never be discovered.

The Court of Appeals identified several important purposes a statement of reasons would serve in rationalizing the Connecticut sentence commutation process for life inmates:

> . . . [T]he record amply supports Judge Blumenfeld's conclusion that a mandatory statement of reasons has a number of salutory consequences. The need to give reasons encourages fair and thoughtful deliberations by the board, thus protecting against arbitrary and constitutionally impermissible decisions. Moreover, it promotes consistency, an important consideration in light of the board's frequent changes in personnel. Finally, it helps inmates to correct misunderstandings by the board or to remedy their own behavioral or other problems which influenced the board's denial of relief.

618 F.2d at 221.

This requirement of reasons compels at least a cursory discussion of each case; silence alone would no longer suffice as a basis for a denial.[12] As this Court

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Should any men, even good men, be unnecessarily trusted with such uncontrolled discretionary power?

K. DAVIS, *Discretionary Justice* at 128-129 (1971).

When Congress enacted the Parole Commission Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219, 18 U.S.C. §§4201 *et seq.*, it added a reasons requirement. 18 U.S.C. §4206(b) (" . . . If parole is denied such notice shall state with particularity the reasons for such denial.").

[12] A member who merely votes yes or no, with no findings or reasons, may in human fashion give in to emotions or whims. Subjecting his findings and reasons to the view of outside critics — and inside critics — may cause him to try to make his

observed in one of its landmark labor decisions of the past decade, the requirement of reasons is one of the most effective ways to ensure careful consideration of a controverted matter

> [A]"reasons" requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies. . .

Dunlop v. *Bachowski*, 421 U.S. 560, 572 (1975).[13]

Reasons would require the State Board not only to direct its attention to each individual case before acting on commutations, but to base its decisions only on those grounds which are relevant:

> . . . [D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

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action appear rational, and the easiest way to appear rational is usually to be rational. Furthermore, equal justice will be more likely if cases can be compared.

K. DAVIS, *Discretionary Justice* at 131 (1971).

[13] Nearly a half century ago, Jerome Frank described the positive role reasons play in careful decision-making:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose — that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. (Footnotes omitted.)

U.S. v. *Forness*, 125 F.2d 928, 942 (2d Cir. 1942).

Gregg v. *Georgia*, 428 U.S. 153, 189 (1976) (Opinion of Stewart, Powell and Stevens, JJ.)

The need for reasons is especially acute in this case because of the absence of any apparent standards. Although the State ordinarily is presumed to act fairly and rationally, the facts of this case not only rebut such a presumption, but suggest the contrary conclusion. The Board denies relief to only a few of the inmates who apply for sentence commutations. Because the Board gives no reasons for its denials and because no standards can be inferred from its decisions, there is no meaningful basis for distinguishing between those cases in which commutations are granted and those in which they are not. *Cf. Furman* v. *Georgia,* 408 U.S. 238, 313 (1972) (White, J. concurring).

In his concurrence in *Furman* Justice Brennan wrote:

> When a country of over 200 million people inflicts an ususually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of non arbitrary infliction . . .
>
> When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.

Id. at 293. The same conclusion is inescapable here. Only a small number of lifers are singled out for harsher

treatment; and like defendants sentenced to death prior to *Furman*, they receive no explanation.

A decision with reasons appears fair and rational to its recipient. The appearance of fairness is essential in the prison setting, as was conceded by Paul McQuillan, Chairman of the Pardon Board:

> . . . [W]e are acutely aware of the fact that within that prison institution every bit of our conduct is closely watched, and if there is an indication of any unfairness it causes a lot of difficulty: and the warden is, of course, very concerned about that sort of thing.

J.A. at 55.

The more comprehensible and fair the system appears to inmates, the more conducive the system will be to rehabilitation — one of the primary goals of incarceration and "the ultimate purpose of parole." *Greenholtz* v. *Nebraska Penal Inmates*, 442, U.S. at 13.

In *Greenholtz* this Court wrote:

> [P]arole determination . . . must include consideration of what the entire record shows up to the time of the sentence, including the gravity of the offense in the particular case. The behavior record of an inmate during confinement is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release.

442 U.S. at 15. When these criteria for parole decision-making are applied to this case, the State Board's decisions denying sentence commutations to Respondents

Brown and Czaja, and granting commutations to inmates like Carrona, Dumschat and Shelton, appear irrational.

The requirement of reasons is not necessarily synonymous with the requirement of a full judicial opinion. Reasons may be brief and circumscribed in their scope. Voluminous, detailed explanations are not necessary and are not sought by the Respondents here. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1, 16. Respondents ask only that they be told why they have been denied a sentence commutation when others who have compiled no better institutional records and commited crimes no less serious have received commutations.

The third factor which must be considered by this Court in determining whether a statement of reasons should be part of the process that is due is the burden which such a statement would impose upon the State Board. Paul McQuillan, Chairman of the Board of Pardons, testified that no significant fiscal or administrative burden would be imposed upon the Board if the agency were required to furnish life inmates with reasons for denial of sentence commutations. The Board already sends each prisoner a piece of paper on which its decision is announced, and the inclusion of a short statement of reasons and underlying facts in the notices provided to the few members of the Respondent class would work no hardship upon the Board. (J.A. at 60, 61) Mr. McQuillan conceded that the imposition of a requirement that the Board furnish each life inmate with a short statement of reasons upon denial of relief would not re-

quire the Board to hold fewer sessions or limit its consideration of prisoner petitions. (J.A. at 71.)

Unlike the Nebraska procedure which this Court approved in *Greenholtz*, 442 U.S. at 16, the Connecticut Board of Pardons does not inform the life inmate whose petition is denied in what respect he falls short of qualifying for a sentence commutation. The elaborate procedures the State Board has already established are debased by the absence of reasons for its decisions. In light of the insignificant burden which a reasons requirement would impose on the State Board, the important benefits that would flow from the provision of reasons, and the vital interest at stake in the commutation proceeding, a statement of reasons is the minimum process due a life inmate whose commutation petition is denied.

CONCLUSION

The State's reliance on this Court's decision in *Schick* v. *Reed*, 419 U.S. 256 (1974), is misplaced. What is at issue in this case is not the occasional exercise of the sovereign's "plenary" pardon power — such as that of the President under Article II of the Constitution — but the regular practice of a state agency, created by statute, with a unique function and history.

The "almost invariable practice" of the Connecticut Board of Pardons of reducing the minimum sentences of life inmates in order to accelerate their parole eligibility, *Dumschat* v. *Board of Pardons (I)*, 593 F.2d 165, 166 (2d Cir. 1979), had resulted in "[t]he overwhelming likelihood that Connecticut life inmates will be pardoned

and released before they complete their minimum terms." *Dumschat* v. *Board of Pardons (II)*, 618 F.2d 216, 220 (2d Cir. 1980). This long-standing, consistent policy and practice of the State Board has given Connecticut life inmates a legitimate expectation that their sentences will be commuted prior to the expiration of their minimum terms. The Board shares this expectation. It expects prisoners serving life sentences to exhibit good behavior while incarcerated and to perform services for the State in order to obtain a sentence commutation. This mutually explicit understanding has conferred upon Respondents the right to a reasoned explanation when their commutations petitions are denied.

For these reasons the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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